21832

NATIONAL LIBRARY
OTTAWA

CANADA

BIBLIOTHÈQUE NATIONALE
OTTAWA

NAME OF AUTHOR.....DONNA LEA HAWLEY.....

TITLE OF THESIS.....LEGAL LIABILITY OF.....
.....CANADIAN PHYSICAL.....
.....EDUCATION TEACHERS.....

UNIVERSITY.....~~U of~~ OF ALBERTA.....

DEGREE FOR WHICH THESIS WAS PRESENTED.....MA.....

YEAR THIS DEGREE GRANTED.....1974.....

Permission is hereby granted to THE NATIONAL LIBRARY OF CANADA to microfilm this thesis and to lend or sell copies of the film.

The author reserves other publication rights, and neither the thesis nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.

(Signed).....

PERMANENT ADDRESS:

.....4903 - 103 AVE.....
.....EDMONTON.....
.....T6A 0S8.....

DATED.....8 OCT.....1974

NL-91 (10-68)

THE UNIVERSITY OF ALBERTA

LEGAL LIABILITY OF CANADIAN PHYSICAL EDUCATION TEACHERS

by

© DONNA LEA HAWLEY

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF ARTS

DEPARTMENT OF PHYSICAL EDUCATION

EDMONTON, ALBERTA

FALL, 1974

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled LEGAL LIABILITY OF CANADIAN PHYSICAL EDUCATION TEACHERS submitted by Donna Lea Hawley in partial fulfilment of the requirements for the degree of Master of Arts.

.....
Supervisor

.....

.....

Date .....

ABSTRACT

This is a study of the legal liability of Canadian Physical Education teachers. The duties of Physical Education teachers are examined in regards to students in regular Physical Education classes, during extracurricular sports and play, and during travelling to approved activities. It is breaches of these duties which give rise to liability. Before the discussion of teacher liability is commenced, an introduction to common law, negligence law, and the position of children in tort law is presented. This is followed by a study of the case law as it relates to Physical Education teacher liability. Statute law is included only to clarify the law and to point out exceptions to the case law, where applicable. Likewise, the legal liability of school boards is included only where it clarifies the position of teachers.

ACKNOWLEDGEMENT

The author wishes to express her thanks to her committee for the assistance given in the preparation of this study. To Dr. R.G. Glassford (Supervisor) and Miss. R.O. Anderson, of the Department of Physical Education; and to Mrs. E.I. Jacobs, of the Faculty of Law, whose generosity in giving her time and advice made the completion of this study an easier task; thank you.

Special thanks is also extended to Mr. R.G. Cummings for allowing me access to his law library and files.

TABLE OF CONTENTS

CHAPTER		PAGE
I.	THE CANADIAN LEGAL SYSTEM--AN OUTLINE	1
	1. Definition of Common Law	1
	2. Sources of the Law	3
	Case Law	3
	The Rule of Precedent	5
	Statute Law	6
	The Interpretation of Statutes	7
	3. Divisions of the Law	9
	Civil Law	9
	Criminal Law	10
	4. The Canadian Court System	11
	The Supreme Court of Canada	13
	The Supreme Court of Alberta	14
	The District Court of Alberta	14
	The Provincial Court of Alberta	14
	The Surrogate Court	15
	The Family Court	15
	The Juvenile Court	15
	5. The Steps in Starting a Civil Action	16
	6. A Reported Case	18

CHAPTER PAGE

II. GENERAL BASIS FOR ACCIDENT LIABILITY--THE LAW OF TORTS 33

1. The Reason for Tort Liability 33

2. The General Principles of Tortious Liability 34

Basis of Negligence 34

The Standard of Care 35

The Reasonable Person 37

Proximate Cause 39

Custom 41

Breach of Statute 43

3. Contributory Negligence 44

Voluntary Assumption of Risk 45

4. Professional Negligence 46

III. THE POSITION OF CHILDREN IN THE LAW OF TORTS 52

1. The Status of Children in Tort Law 52

The Standard of Care 52

Children as Tortfeasors 53

The Test for the Liability of Children . . . 57

Capacity of Children to Sue and Be Sued . . 58

2. The Position of Parents in Relation to Their Children 60

The Duty of Parents 60

CHAPTER PAGE

Liability of Parents for the Acts of their Children 63

Liability of those in the Place of Parents . 65

3. Contributory Negligence of Children 67

4. Occupier's Duty Towards Children 75

IV. STATUTORY DUTIES OF TEACHERS

1. The Statutory Definition of Teacher 87

2. Statutory Duties of Teachers 88

V. LIABILITY FOR PHYSICAL EDUCATION CLASSROOM ACCIDENTS 92

1. The Test for Teacher Liability 93

2. The Duty of Physical Education Teachers . . 98

Instruction 99

Supervision 105

Provision of Safety Measures 107

Summary of the Duties 113

VI. LIABILITY FOR ACCIDENTS DURING TRAVELLING AND EXTRACURRICULAR ACTIVITIES 118

1. Liability for Playground Accidents 119

Duty to Anticipate Dangers on the School Grounds 119

Duty to Warn Students of Dangers 121

CHAPTER PAGE

Duty to Supervise 122

Duty to Know Propensities of Children . . . 124

2. Liability for Authorized Activities 124

3. Liability for Travelling Accidents 126

VII. VICARIOUS LIABILITY--THE TEACHER AND THE SCHOOL BOARD 131

1. The Basis of Vicarious Liability 131

The Control Test 132

When the Employer is Liable 134

2. Justifications for the Existence of Vicarious Liability 135

3. Vicarious Liability in Schools 137

VIII. DEFENCES TO TORTIOUS LIABILITY 143

1. Contributory Negligence 144

2. Statutory Time Limitations Exceeded by the Plaintiff 146

3. Custom 150

4. No Duty of Care 151

5. Others 155

IX. CONCLUSIONS 160

CHAPTER PAGE

BIBLIOGRAPHY 163

APPENDIX A

Glossary of Terms 166

APPENDIX B

Judicial Statements on Specific Physical Activities and Physical Education Apparatus 167

CHAPTER I

THE CANADIAN LEGAL SYSTEM--AN OUTLINE

This chapter is intended to be an introduction to the Canadian legal system, which will, hopefully, "set the stage" for the reader who is not familiar with the law. Because of the nature of this study, and the complexity of the law, the information contained herein is very succinct. If the reader wishes to obtain a source for a more explicit description of the Canadian legal system, reference should be made to the footnotes at the end of this chapter.

1. Definition of Common Law

All of the English-speaking provinces of Canada utilize the common law system which was introduced to the New World by English settlers. Quebec is the only province which does not have a common law system. In place of common law, Quebec has a civil law system which is based on, and derived from, French law. This system is embodied in a "civil code" which is a legislative consolidation of the laws of the province. The codification of the laws includes sections

which parallel the common law's provision for injuries caused by negligence. The civil law system will not be dealt with in detail in this study, but will be included when applicable.

Common law has had many meanings in the history of its development. Glanville Williams[1] described four of these meanings:

(1) Originally it meant the law that was not local law, that is, it was the law that was common to the whole of England.

(2) More usually today it means ". . . the law that is not the result of legislation, that is the law created by the custom of the people and the decisions of the judges."[2]

(3) It may refer to the law developed by the old courts of law as distince from the law from the Court of Chancery.*

(4) It may mean the law of England, or the law of other countries, such as Canada, which have adopted English law.

---

* In the Middle Ages the courts of common law sometimes failed to give redress when it was needed. The King set up the Court of Chancery, which was presided over by the Chancellor, who was the "keeper of the King's conscience," to deal with instances of injustice. This court was intended to remedy the imperfections in the common law. This system became known as "equity." The rules of equity followed the common law even though in times of conflict, equity often came to prevail over the common law. Today, in Canada, our courts are both courts of law and of equity combined.

It is this last definition which describes the term common law as used in this study. The second definition, that law created by the decisions of judges, or laws which are obtained from cases, is usually referred to as "case law," and will be referred to as such in this study.

2. Sources of the Law

There are two sources of law--primary and secondary.

In Canada primary material is found in the form of:
1. Statutes and constitutions.*
2. Regulations passed under the authority of statutes.
3. Orders-in-Council.
4. Reasons for judgement in decided cases.
5. Reasons for decisions of various boards and tribunals.[3]

Secondary materials include: "(1) aids in finding primary material, and, (2) commentaries on the law."[4] Generally, primary sources of law are considered to be the most important in the determination of the law. Of these primary sources the most important are statutes and reasons for judgement in decided cases--or case law. This study will be concerned only with these two.

Case Law

In early common law courts great attention was paid to earlier decisions. The earlier cases at first served only

---

* Any terms that are not explained in the text can be found in the Glossary of Terms in Appendix A.

as a guide by which judges followed those who had dealt with similar problems in the past. As the method of reporting decisions was refined, the use of case law allowed the law to be ascertained and predicted with a greater degree of certainty.[5]

Case law has been defined as:

> The aggregate of reported cases as formed by a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.[6]

It is therefore, the law as set down by judges in their decisions on cases heard before them. The use of case law is described by Frank:

> . . . when a judge decides a case he not only disposes of the immediate problem before him, but he also lays down a legal principle which other judges will have to follow [subject to reservations] . . . . The legal principles on which the judgement rests and which thus represents the core of the decision is called the ratio decidendi. This has to be distinguished from the remainder of the judge's decision, in which he may have discussed matters which were not directly relevant to the problem before him . . . . It is only the ratio decidendi which operates as a precedent. No comments which a judge might make, however great his reputation, will be precedents unless they were part of the decision of an actual case in court.[7]

The reservations as to which courts must follow decisions laid down by other courts are governed by the rule of precedent.

The Rule of Precedent

The rule of precedent was developed since:

> . . . it is of supreme importance that people may know with certainty what the law is, and this end can only be attained by a loyal adherence to the doctrine of stare decisis.[8]

Stare decisis is the doctrine that when a court ". . . has once laid down a principle of law as applicable to a certain state fo facts, it will adhere to that principle, and apply it to all future cases . . ."[9] in which the facts are substantially the same. Thus, by following and applying the law in the same manner as it was applied in earlier similar cases, the law became not only certain, but fair as well.

The general rule of precedent is that every court binds lower courts.[10] In Canada the rule is applied as follows:

(1) Decisions of the Supreme Court of Canada are binding on all other courts.*

(2) Decisions of provincial Courts of Appeal are binding on all other courts in that province.

(3) Decisions of a provincial court are of persuasive value only in courts of similar, or lower status, in other provinces.

There are two methods by which a judgement can lose

---

* Decisions of the Supreme Court of Canada can be reversed by a later S.C.C. decision, or they can be changed by legislation.

its authority. Firstly, a decision that is made in any court, other than the Supreme Court of Canada, may be appealed to a higher court. The higher court may change the decision of the lower court. "When one of these appeal courts reverses or overrules a case in a court below, the case so reversed or overruled loses all authority."[11] Secondly, a case may be "distinguished" and thus not followed. If a court feels that a certain case with similar facts to the one before it, should not be followed because of changes in society or an important difference in the facts of the cases, it may refuse to follow the case. This is called distinguishing.

Because decisions can be changed by courts of appeal, or by a new decision of a high court which reverses its own earlier decisions, or by the distinguishing of earlier cases, case law is allowed to be flexible and it is possible for the law to change and to follow societal changes.

Statute Law

Historically statute law was of secondary importance to case law, but today it is of equal, if not greater, importance. The doctrine of the supremacy of Parliament causes courts to first look for any legislation that may exist concerning a point of law. Statutes, created by elected officials, are more certain than cases since they

set out the law in a precise manner. Like case law, statute law is flexible since it can be repealed by the legislative body that created it, or a new statute can be created to take the place of an old one, to settle the law where there was none, or to affirm or reverse a judicial decision.

> The three main functions of statutes are to codify areas of law which have become excessively convoluted through the steady accretion of case law . . . ; to change or reform the case law . . . ; and to set up schemes of administration to deal with problems on human affairs not touched by case law. . . .[12]

Once a bill has been properly passed by the House of Commons and the Senate, or by provincial legislative assemblies, and has received Royal Assent, it is a source of good law, ". . . however ill-conceived or badly drafted it may be."[13] The courts must apply statutes even if they do not approve of them. Statutes remain good law as long as they have not been repealed by legislation. Statutes, then, are a very powerful source of law, but they must be interpreted in order that their meaning can be ascertained.

The Interpretation of Statutes

The meaning of statutes is derived from two sources: (1) interpretation acts, and, (2) judicial interpretation. Interpretation acts, among other things, define the meaning of words commonly found in statutes. An example of such a definition is the following found in the Alberta Act:[14]

> 18. (1) In an enactment,
>
> (h)words importing male persons include female persons and corporations;

Judicial interpretation of statutes is the most common method of statute interpretation. Although there is not complete certainty as to how statutes will be interpreted, some approaches have been established, some being followed at one time, different ones at other times. These approaches are:

> 1. The meaning of a statute must always be derived from its wording. No account may be taken of any extraneous information, such as Parliamentary reports, Ministerial pronouncements, or memoranda or anything of that sort.
> 2. The words of a statute should always be interpreted according to their literal meaning . . . .
> 3. Words should always be interpreted in the context in which they appear, and not in isolation.
> 4. Where the words used are ambiguous, the statute should be considered as a whole to discover the purpose which the legislators had in mind when they passed it . . . .
> 5. There exists a presumption against an alteration of the common law . . . .
> 6. Where . . . general words are used following specific words, the general words will be construed as applying to persons or things of the same kind as described by the specific words.[15]

Once a section of a statute has been given an interpretation by a court, because of the rule of precedent, the interpretation stands unless one of the above mentioned techniques to distinguish or overrule it is applied.

3. Divisions of the Law

Wrongs in common law systems are divided into two major categories: criminal and civil. Civil law in this context should not be confused with the civil law system of law such as that of Quebec. The distinction between civil and criminal law does not reside in the nature of the wrongful act or omission itself, but rather from the "legal consequences" that may follow an act or failure to act.[16] One act may be both a crime and a civil wrong at the same time. If a person runs a pedestrian down with his car, the injured person may sue the wrongdoer in a civil action, and the police (for the state) may bring a separate criminal action against the same driver. Each action is tried separately, in a different court, and may produce different verdicts for or against the driver.

> The real difference between civil and criminal law rests rather on the form of proceedings and the nature of the courts than on inherent differences in the content of the two systems.[17]

This study is concerned only with civil law, which includes the law of negligence, but for comparative purposes a short description of criminal law is included in this section.

Civil Law

> Civil law has been very largely created in response to pressure from below. One person has suffered material loss through the act or omission of another and applied to the courts for a remedy.[18]

Civil proceedings (the steps taken in a legal action) are taken to either recover property, or to enforce obligations in favour of one party. Actions to recover property, or to obtain damages in money for injury or loss to a person or property, are encompased by the law of torts. Actions to enforce obligations usually come under the law of contract.

In a civil action the plaintiff (the person seeking relief) sues (takes legal proceedings claiming a civil right) the defendant (the person sued in an action). The court, once it has heard the evidence presented by both the plaintiff and the defendant, makes a decision as to which side "wins" the case. If the plaintiff is successful the court awards a judgement for the plaintiff. The:

> . . . judgement may order the defendant to pay the plaintiff money, or to transfer property to him, or to do or not to do something (injunction), or to perform a contract (specific performance).[19]

If the defendant is successful and shows that the plaintiff was wrong in his allegations, the court will dismiss the action.

Criminal Law

The criminal law is not concerned ". . . with repairing an injury that may have been done to an individual, but with exacting a penalty in order to protect society as a

whole."[20] Criminal law is "imposed from above," that is, the state creates and enforces the criminal law on behalf of society.[21] Its purpose is preventative since it exists to suppress crime and punish criminals.

Criminal law is basically statute law (including judicial intrepretations). A crime is:

> . . . an act which is forbidden, or the omission to perform an act which is commanded . . . by statute or regulations . . . ; the remedy for which is the punishment of the offender at the instance of the State.[22]

In Canada criminal law is included in the power of the federal government.[23]

In a criminal action, the procedure is as follows: a person is charged (accused) with an offence (act or omission punishable under the criminal law); the prosecutor (the person who institutes criminal proceedings on behalf of the Crown) prosecutes the accused (the defendant in a criminal case against whom an accusation is made); at the end of the trial, a judgement is set down. If the court finds the accused not guilty of the charge then a verdict of acquittal is given. On the other hand, if a verdict of guilty is found, the accused is convicted and a sentence (punishment) is given.

4. The Canadian Court System

The Canadian court system was established by The British

North America Act.[24] This act allowed the provinces to create courts within each province:

> 92. In each Province the Legislature may exculusively make Laws in relation to Matters coming within the Classes of Subjects next here-in-after enumerated, that is to say,--
> 14 The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

The act gave the Governor General the power to appoint and control judges in these courts.[25] The act also provided for the establishment of a supreme court in Canada.

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, . . .

The act also provided that either English or French could be used by any person in any court established under the act.[26]

Each province has established its own court system, as was allowed under the Act. The system presently in operation in Alberta will be used as an example of the general pattern of courts in Canada. The various courts are not listed here in an order of supremacy. Some of the courts are of equal status to one another, but are specialized in the area of law over which they have jurisdiction. For simplicity they will be listed vertically here. The court

system in Alberta includes:

The Supreme Court of Canada

The Supreme Court of Alberta

Appellate Division

Trial Division

The District Court of Alberta

The Provincial Court of Alberta

The Surrogate Court

The Family Court

The Juvenile Court

The Supreme Court of Canada

The Supreme Court of Canada, is a court of common law and equity, and was established as a general court of appeal for Canada.[27] It is presided over by the Chief Justice and eight puisne judges.[28] Any five judges constitute a quorum and may hold the court.[29] The court holds civil and criminal appellate jurisdiction throughout Canada.[30] The court may dismiss an appeal, give a judgement,[31] or order a new trial.[32] That it is the most powerful court in Canada is shown by the following section of the Supreme Court Act:

> 54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgement of the Court is, in all cases, final and conclusive.

The Supreme Court of Alberta

The Supreme Court of Alberta is a superior court of civil and criminal jurisdiction.[33] It consists of two branches, or divisions, the Trial Division and the Appellate Division.[34] The Trial Division is presided over by a Chief Justice and thirteen other judges,[35] and has very wide jurisdiction over most matters.[36] The Appellate Division has a Chief Justice and six other judges,[37] of which three are required as a quorum.[38] The Appellate Division has jurisdiction to hear and determine:

> (i) all applications for new trials,
> (ii) all questions or issues of law,
> (iii) all questions or points in civil or criminal cases,
> (iv) all appeals or points in civil or criminal cases, respecting a judgement [of any other lower court including the trial division] . . . .[39]

The District Court of Alberta

There are two District Courts, one for Northern Alberta and one for Southern Alberta. This court has jurisdiction over claims for debt or damage, and such cases may be initiated in this court.[40]

The Provincial Court of Alberta

The Provincial Court has jurisdiction in regards to certain criminal matters, as well as civil matters such as small debt claims.[41]

The Surrogate Court

The Surrogate Court has jurisdiction over such matters as the guardianship of children, testamentary matters and wills.[42]

The Family Court

The Family Court generally is concerned with matters dealing with the maintenance of deserted wives and children, custody of children by one parent, and common assault charges between family members.[43] In addition this court deals with

> . . . charges against adult persons under The School Act for failure to cause a child to attend school and continue in regular attendance thereat.[44]

The Juvenile Court

The Juvenile Court has jurisdiction in areas related to juvenile delinquents[45] and neglected children.[46] The reports from this court are kept confidential.[47]

The courts which are important to this study are the District Court, the Supreme Court of Alberta Trial Division and Appellate Division, and the Supreme Court of Canada. An action for damages in negligence can be commenced in either the District Court or the Alberta Supreme Court Trial Division. In Edmonton or Calgary, such an action, if it involved a claim for a substantial amount of damages, would be commenced in the Trial Division. Actions for smaller

amounts of damages, or in smaller centres of the province, would usually be commenced in District Court. The party who is not successful can appeal the trial decision to the Alberta Supreme Court Appellate Division, and the unsuccessful party at this appeal may appeal to the Supreme Court of Canada. If no appeal is requested then the trial decision stands, otherwise, the last court which set a judgement is the one by which the parties must abide.

5. The Steps in Starting A Civil Action

This is an extremely complex area of the law and only a brief outline will be presented here.

Once a civil wrong has been committed, the first step a party takes is to obtain legal advice from a lawyer. The lawyer will brief the law and advise his client as to whether or not there is a good basis for proceeding with the action, if there is enough evidence to prove the case, or if any statutory limitations for commencing the action have been exceeded. The client must decide whether or not to carry on with an action, and must instruct the lawyer in this regard.

What happens after this is set out in formalized steps in the Alberta Rules of Court.[48] A civil action is commenced by "pleadings" which are alternate statements by the parties involved. These pleadings set out the questions in

controversy, giving notice to the other party and set out a record of the issues of the action.[49]

The first part of the pleadings is: the plaintiff issues a Statement of Claim which sets out the facts and serves to inform the defendant of the allegations made against him. Next, the defendant usually issues a Statement of Defence which sets out a defence or answer to the plaintiff's allegations. If the defendant feels that he has a cause of action against the plaintiff, he will issue it in a Counterclaim at the same time as the Statement of Defence is filed.

If an action proceeds to this point it is likely that all parties will be questioned in an Examination for Discovery. In an Examination for Discovery, any person who is a party to an action, may be orally examined under oath, before the trial. The parties, and their lawyers, meet with a court reporter present who records transcripts of all that is said. Each lawyer questions the parties from the opposing side of the action, that is, the plaintiff's lawyer questions the defendant, and the defendant's lawyer questions the plaintiff. The answers obtained may be used at the trial of the parties' action, but only against the person who uttered them. A lawyer cannot use his own client's statements at trial to his own advantage. The

Examination for Discovery is used to obtain more information on both and is often the basis for settlement proposals.

After this an action may be settled, may be discontinued by the plaintiff, or it may proceed to trial.

6. A Reported Case

Since much of the common law depends on precedents from case law, it is important that lawyers and judges be able to find what the decisions were in other cases. This is achieved by the production of Law Reports. Law Reports are volumes containing recently decided cases that would be of interest and use to practising lawyers. These are produced by independent publishers, and are distributed widely to lawyers, judges and law libraries.

There are a number of provincial law reports. Of interest to Western Canadians are the Western Weekly Reports. This series reproduces decisions from the courts of the four western provinces, and Supreme Court of Canada decisions from these provinces. The Ontario Reports reproduces decisions of that province and are a prime source of case law for lawyers from Ontario. Of interest to all Canadians are the Dominion Law Reports which includes the major decisions from all of Canada, and the Supreme Court Reports which includes only decisions from the Supreme Court of Canada.

A standardized form of citation, as set out below, is used in order that a case may be found in these reports. An example is:

Hall v. _Thompson_ [1952] 4 D.L.R. 139 (Ont. C.A.).

The names of the two parties are listed with the plaintiff's surname first. The v. between the names of the parties is read as "and." The date the case was reported is followed by the volume number of the report series, the abbreviation of the report (in this case the _Dominion Law Reports_), and the page number. The court in which the case was heard is usually placed in brackets at the end of the citation (in this case the Ontario Court of Appeal).

Cases are usually reported in a standardized form. The following is an example of such a case:

The names of the parties are listed first as a "title" to the case. Here the plaintiff, who is the appellant in an appeal, is McKay.

50

McKAY et al. v. BOARD OF GOVAN SCHOOL UNIT No. 29 OF SASKATCHEWAN et al.

Next is listed the court in which the decision was resolved, the names of all of the judges who sat on the decision, followed by the date on which the decision was determined.

Supreme Court of Canada, Martland, Judson, Ritchie, Hall and Spence, JJ. April 29, 1968.

Headings describing the major points of the first issue, or question to be decided, of the case are set out.

Negligence — Standard of care — High school student practising gymnastics on parallel bars — Supervised by teacher — Standard by which teacher's conduct to be judged — Reasonably careful parent or competent instructor in field.

The Headnote follows. This is a summary of the judgement and is written by the editors of the law report. Since a range of persons are employed to write these headnotes, some having no legal training and others being skilled lawyers, these can vary in their usefulness and correctness.

The standard of a careful parent is an appropriate one by which to judge the conduct of a teacher supervising a group of 12 to 18 high school students practising gymnastics. Even if the appropriate standard were that of an ordinarily competent instructor in the field, a direction by the trial Judge to the jury to apply the former standard does not constitute a misdirection prejudicial to defendant since it invites the jury to judge defendant by a lower standard than that by which it ought to have been judged. Where a student is severely injured falling from parallel bars and the jury finds negligence in lack of instruction and safety precautions, the verdict is justified. A reasonably careful father would not permit a son inexperienced in gymnastics to perform intricate manoeuvres on the parallel bars under such circumstances.

The second issue of the case is listed in headings. These are included so that a reader may more easily find if the case includes items of particular interest.

> **Damages — Personal injuries — High school student suffering paraplegia — Propriety of Judge's charge to jury — Issue of life expectancy — Whether jury instructed that earnings and cost of future care cumulative.**

The citation for any other reported decision arrived at by a lower court for the particular case in question is given next. This case was heard at a trial and an appeal court before it came to the Supreme Court of Canada. The lawyers for both sides are also named. This information can assist a person who wishes to find more information about the case.

> APPEAL from a judgment of the Saskatchewan Court of Appeal, 62 D.L.R. (2d) 503, 60 W.W.R. 513, reversing a judgment of MacPherson, J., in favour of the plaintiff in an action for damages for personal injuries tried with a jury.
>
> *K. R. N. MacLeod* and *W. J. Vancise*, for appellants.
> *D. G. McLeod*, Q.C., and *R. H. Bertram*, for respondents.

The judgement can be given by one or more of the judges. If all agree only one may write up the decision, as in the case here. If other judges arrive at the same decision but for different reasons, or if they arrive at a different (dissenting) opinion, each may write a separate judgement which is included under his name. The first part of the decision is usually a setting out of the facts.

The judgment of the Court was delivered by

RITCHIE, J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan, Hall, J.A., dissenting, setting aside a judgment rendered in favour of the present appellant after a trial with a jury before MacPherson, J., and ordering a new trial on the issues as to both liability and damages.

This action was brought by Ivan McKay as next friend of his infant son, Ian McKay and personally against the respondent School Board and one of its teachers, Donald Molesky, for damages arising out of injuries sustained by Ian McKay when he fell between parallel bars while practising for a gymnastic display which was to be staged by the William Derby High School, where he was a pupil, at a variety night performance arranged by that school. As a result of the fall the boy developed paraplegia and after long hospitalization and treatment, he was, at the time of the trial (two years after the accident) paralysed from the neck down except for some shoulder and bicep muscles.

The action against Molesky was dismissed by consent having regard to the provisions of s. 225*a* [am. 1961, c. 29, s. 11] of the *School Act*, R.S.S. 1953, c. 169 [now R.S.S. 1965, c. 184, s. 242], which provides that where the principal of a school approves or sponsors activities such as those here in question "the teacher responsible for the conduct of the pupils shall not be liable for damage . . . for personal injury suffered by pupils during such activities".

Ian McKay was athletically inclined and was one of a group of 12 to 18 students who had volunteered to put on the gymnastic display under the supervision of Molesky who had had some experience in gymnastics while at teachers' college but who was not a qualified instructor in gymnastic work on the parallel bars. In the early days of practice for this display, the activities of the boys were limited to "tumbling" on mats on the floor, but a few days before the accident some parallel bars were brought from the public school to the scientific laboratory in the high school which was being used as the scene of the gymnastic practice. The evidence does not disclose that McKay had ever done any work on parallel bars before this time, but after a few days' practice he assayed, under Molesky's charge and direction, the difficult feat which he describes as swinging his legs back and forth quite a few times with a view to gathering sufficient momentum to do a flip at the end of the bars and he says that his legs "were getting a little bit higher each time and when they were about level with my head, I guess about a foot above the bars, then I fell . . . in between the bars face down with my head turned a little to the left".

There is some difference between the witnesses as to the exact manoeuvre that the boy was trying to perform and Molesky described a simpler movement, but in any event, this untrained youth was in my opinion undoubtedly engaged in an exercise which was dangerous for him and which required close supervision. McKay says that Molesky had described the

exercise but had not demonstrated it. Molesky and one of the other boys apparently were acting as what Molesky describes as "spotters" whose function was to help the performer on the parallel bars in his dismount, but it is clear that neither of them was at any time in a position to assist McKay in what he was doing or to prevent a fall in the area where it took place.

The following admissions were formally made by the respondent School Board:

1. That on or about the 12th day of February, A.D. 1963, the defendant, Donald Molesky, was employed by the Defendant, the Board of the Govan School Unit, as a teacher at the William Derby High School and that during the school hours on the said day, the defendant, Donald Molesky was acting in the course of his employment as such.
2. That the Plaintiff, Ian McKay, sustained injury to his person during school hours on the said day during activities then being supervised by the defendant, Donald Molesky, and approved or sponsored by the principal and teachers of the said High School, all duly appointed by the defendant, The Board of the Govan School Unit; and that the supervision of the said activities had been assigned to the defendant, Donald Molesky by the said principal of the said high school.
3. That the said defendant, Donald Molesky, was responsible for the conduct of the pupils, including the plaintiff, Ian McKay, taking part in the said activities, within the meaning of section 225a of The Schools Act.
4. That at the said time the defendant, Donald Molesky had the right of control of the said pupils including the plaintiff, Ian McKay.

Information obtained from the trial or appeal can be used.

After a lengthy trial, the jury gave the following answers to questions submitted by the learned trial Judge:

1. Has the plaintiff satisfied you that the defendant failed in his duty of care to the plaintiff and that the said failure in whole or in part resulted in the injury to the plaintiff?

Answer: Yes.

2. If answer number 1 is "Yes" then please state fully the acts or omissions which constituted the failure in duty of care.

Answer:

(i) Lack of competent instruction on parallel bars.
(ii) Insufficient care and attention to spotting.
(iii) Insufficient demonstration on parallel bars.
(iv) Progressive steps on parallel bars rushed.
(v) Instructor not sufficiently qualified.
(vi) Insufficient safety precautions.

3. Has the defendant satisfied you that the injuries of the plaintiff were caused or contributed to by his failure to exercise reasonable precautions for his own safety?

Answer: No.

The jury assessed damages for the infant plaintiff at $183,900.

After the facts of the case are set out, the reasons for this present decision are explained.

> It appears to me to be desirable before considering the reasons for judgment of the Court of Appeal [62 D.L.R. (2d) 503, 60 W.W.R. 513], for me to state that in my opinion the evidence is capable of supporting the answers which the jury gave to the first three questions which were submitted to them, but they did not necessarily have to reach the conclusion which they did and if, as the majority of the Court of Appeal has found, there was misdirection prejudicial to the respondent in the charge of the learned trial Judge respecting the standard of care required of the school authorities, then there should, of course, be a new trial on the question of liability.

In the reasons for the judgement, the law is set out. This often includes the use of precedents.

> In his charge to the jury the learned trial Judge repeatedly told them that the duty of care which Molesky owed to young McKay was that which a careful father of a large family owes to his children. This view, which has often been adopted, was first expressed many years ago by Lord Esher, M.R., in *Williams v. Eady* (1893), 10 T.L.R. 41 at p. 42, where he said:
>
> > . . . as to the law on the subject there can be no doubt; and it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster.
>
> While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that which Molesky had in his charge in the improvised gymnasium, is one to which Lord Esher's words do apply.
>
> Mr. Justice Woods, however, in the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal, expressed the view that while the test of the "careful father" is readily applicable to students taking part in team games such as hockey or baseball, it did not apply to the facts of this case and he continued by saying [62 D.L.R. (2d) at p. 512]:
>
> > A physical training instructor in directing or supervising an evolution or exercise is bound to exercise the skill and competence of an ordinarily competent instructor in the field. The standard of the careful parent does not fit a responsibility which demands special training and expertise.

The learned Judge later said:

> The standard of the person possessed of special training or expertise may well be higher than that of the careful parent and it may well be that on applying it to the present facts a jury might arrive at the same result. This, however, is conjectural and therefore cannot be assumed. The standard of care put before the jury was inappropriate and confusing. It amounts to misdirection.

I take the view that a reasonably careful parent would have been unlikely to permit his boy, almost totally inexperienced in gymnastics, to execute the manoeuvre which young McKay performed without exercising a great deal more care for his safety or ensuring that someone else did so on his behalf.

The position in the present case is that Molesky had accepted responsibility for the care and control of young McKay while he was engaged in the gymnastic practice and whatever analogy is involved in describing the standard by which Molesky's duty is to be tested, it is clear to me that his supervisory duties required him to guard against foreseeable risks to which this inexperienced boy was exposed in the performance of exercises on the parallel bars. There was, in my opinion, a real risk that the boy might fall and there was a concomitant duty to guard against that risk eventuating. The particulars specified in the jury's answer to Q. 2 constitute a finding that there was a breach of that duty.

With the greatest respect, it seems to me also that when Mr. Justice Woods held, in effect, that the learned trial Judge was wrong in directing the jury that the respondent owed the boy the duty of "a careful parent" rather than the duty which would have been owed by a "physical training instructor", he was saying that the Judge had invited the jury to determine the liability of the respondent School Board according to a lower standard of care than that by which it should have been judged. If this were indeed the case, it is difficult to understand how the respondent has any cause for complaint. This appears to me to be the ground upon which the majority of the Court of Appeal set aside the jury's verdict as to liability, and with all respect, I do not think that it can be supported and I would accordingly restore the verdict of the jury in this regard.

After a decision has been made on the first issue to be decided (here it is on the liability of the defendant), the second issue (here the quantum of danages) is considered. Damages will not be investigated in this study, but this part of the case is included here for completeness and interest.

Mr. Justice Woods also concluded that the learned trial Judge had so misdirected the jury on the question of damages as to make a new trial necessary on this issue. This conclusion must, of course, be considered in light of the provisions of Rule 39 of the Saskatchewan *Court of Appeal Rules* which read, in part, as follows:

> 39. A new trial shall not be granted on the ground of misdirection . . . unless in the opinion of the court, some substantial wrong or miscarriage of justice has been thereby occasioned in the trial . . .

When considering the jury's assessment of damages in isolation from the question of liability, it seems to me that this Rule must mean that even if there was misdirection on the part of the trial Judge, the Court of Appeal could not grant a new trial unless it were satisfied that the damage award was so high or so low as to constitute a substantial wrong or miscarriage of justice.

There can, I think, be no doubt that the injuries sustained by Ian McKay were of such a massive and crippling character as to justify a very substantial award of damages. There does not appear to be any hope of his recovery and the only evidence of any possible improvement is highly speculative. The task of the jury was to endeavour to express the effect of his almost total physical disability in terms of financial recompense. Involving as it did so many imponderables, this was not an easy problem for the jury who had to make the assessment or for the Judge who had to direct them as to the principles by which they should be guided.

In an attempt to provide some yardstick by which to judge the loss, evidence was adduced from a member of the staff of the head office of an insurance company who testified by reference to certain statistical tables that the average life expectancy of a youth of McKay's age would be 53 years, and a doctor who was familiar with his case stated that although some insurance companies were now insuring paraplegics, he did not feel that a normal life expectancy, even of a paraplegic, could be expected in Ian's case.

Young McKay had apparently had some ambitions to become an architect and it was suggested that a figure of $500 per month would be a moderate one to represent his potential future earnings if he had not been injured; his father also gave evidence that without the constant care which he is now getting at his home, it would cost at least $150 to retain someone to look after him.

In the course of his reasons for judgment, Mr. Justice Woods singled out [p. 514] the following quotation from the learned trial Judge's charge as constituting "misdirection on a vital factor":

> "The damages which you calculate and which you award, gentlemen, as both counsel have said, cannot be perfect. You heard evidence as to the effect that to provide $500.00 a month for fifty-three years, requires $133,000.00. That is based upon 4%. But, of course, we have no way of knowing, you have no way of knowing, how long this chap will live, or how long he would have lived if he had not had the injury."

Mr. Justice Woods, in commenting on this statement, said:

> The charge, when referring to this 53 years, if it does not in fact do so, comes close to stating that such is the expectation of life of this infant plaintiff, properly to be considered by the jury in its calculation of damages. Considering all that was said on this factor, I cannot but come to the conclusion, that the charge was much too favourable to the infant plaintiff. It failed to adequately place before the jury, the probable life expectancy of the infant plaintiff as the basis of its calculation for this portion of damages suffered. I am of the opinion that this constitutes misdirection on a vital factor.

With the greatest respect, it appears to me that the learned Judges who formed the majority of the Court of Appeal overlooked the fact that almost immediately after the excerpt quoted above from the trial Judge's charge, he went on to say:

> I did not consider that Mr. Clark (the insurance man) said that fifty-three years was the life expectancy of an annuitant. It was the life expectancy on the average, established by various insurance companies as far ago as 1938, 1939. It was before the war in any event. You cannot, gentlemen, in calculating this thing, just add up what he might have earned, what he needs to maintain himself — add it all up and say that is what he is entitled to. This is perfect damages. The law says that you cannot make perfect damages. You cannot determine all the — you cannot add up all the income he might have made as an architect because you do not know whether he would have become an architect, whether he would have got through University, whether he would have gone back to his father's farm; . . .

Notwithstanding this language, Mr. Justice Woods also found that the jury had been instructed "that earnings and cost of future care are to be cumulative, in the calculation of damages" and he based this on a passage earlier in the Judge's charge where he had said of "the financial loss experienced by this plaintiff" — "I refer not only to . . . prospective earnings for the balance of his life, but to the financial loss resulting from constant care for the rest of his life . . ." With the greatest respect, I think that if there was any misdirection in this statement it was fully corrected and that there was no misdirection in this regard.

Mr. Justice Woods also criticized the charge of the learned trial Judge on the ground that he had not warned the jury against letting sympathy affect their calculation of damages and in failing to state that the award "should not be punitive, exemplary, nor extravagant and oppressive". In so doing, Mr. Justice Woods discounted the fact that at the beginning of his charge the learned trial Judge had said:

> . . . this is a Court of Law, and however profound your sympathy you must in this Court disregard it because sympathy is a poor guide in the search for legal principles.

and that before embarking on the main body of his charge, he had again said: ". . . you will rid yourselves of sympathy." In addition to this, immediately before addressing the jury on the subject of damages, the learned trial Judge said:

> I repeat to you, gentlemen, what I said in opening. Sentiment is no guide in the search for legal principles. Do not be governed in your decision on liability by the sympathy which undoubtedly you have for the plaintiff.

I cannot find that there was any misdirection in this regard.

Mr. Justice Woods further criticized the learned trial Judge for failing to instruct the jury that some discount should be made for the present payment of that portion of the damages designed to cover McKay's future requirements. It may be that some direct reference should have been made to this element, but I do not think that it can be said that the absence of such a direction constituted substantial wrong or miscarriage of justice.

In conclusion, Mr. Justice Woods said [p. 516]:

> I am left with the strong conviction that in calculating the award, the jury has taken the annuity cost of $500 per month for 53 years, namely $133,000 (which is not shown to have any direct relationship to the plaintiff's needs), and has added thereto a substantial sum for other elements of damages, to arrive at the total of $183,900. It cannot have allowed for all the contingencies of life which might have or may now happen. This indicates error, which, in substantial part, may have arisen from the matters referred to.

With the greatest respect, it appears to me that in this passage Mr. Justice Woods entered upon the dangerous field of attempting to delve into the minds of the jury and to interpret their verdict in terms of his own mental processes.

In relation to the last-quoted excerpt from the judgment of the Court of Appeal, it should be pointed out that in my view full instruction was given to the jury in relation to "the contingencies of life". The learned trial Judge read to the jury a paragraph from the judgment of Sellers, L.J., in *Warren et al. v. King*, [1963] All E.R. 521 at p. 527, in which he said, in part:

> . . . damages must take into consideration, in varying degrees according to circumstances, the many contingencies of life, its misfortunes as well as its good fortunes.

With the greatest respect, I am unable to agree with the Court of Appeal that there was any such misdirection in the charge of the learned trial Judge as to warrant the granting of a new trial.

Once all of the issues have been decided, the judgement is usually given in a final sentence at the conclusion of the report.

> For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Court of Queen's Bench of Saskatchewan.
>
> The appellant will have the costs of this appeal and of the appeal to the Court of Appeal of Saskatchewan.
>
> *Appeal allowed.*

FOOTNOTES

1 Williams, Glanville, Learning The Law, seventh edition, Stevens & Sons, London: 1963.

2 supra, at 25.

3 Christie, Innis, editor, Legal Writing and Research Manual, Butterworths, Toronto: 1970, at 11.

4 supra, at 12.

5 supra.

6 Black, Henry Campbell, Black's Law Dictionary, fourth edition, West Publishing Co., St. Paul, Minn.: 1968, at 272.

7 Frank, W.F., The General Principles of English Law, second edition, George G. Harrap & Co. Ltd., London: 1961, at 23.

8 Stuart v. The Bank of Montreal and Stuart (1909) 41 S.C.R. 516, at 549.

9 Black, supra, n. 6, at 1577.

10 Williams, supra, n. 1.

11 supra, at 88.

12 Christie, supra, n. 3, at 54-55.

13 Frank, supra, n. 7, at 25.

14 The Interpretation Act, R.S.A. 1970, c. 189.

15 Frank, supra, n. 7, at 26.

16 Williams, supra, n. 1.

17 Kiralfy, A.K.R., The English Legal System, third edition, Sweet & Maxwell Limited, London: 1960, at 9.

18 supra, at 10.

19 Williams, supra, n.

20 Fleming, John G., The Law of Torts, The Law Book Company Limited, Sydney: 1971, at 1.

21 Kiralfy, supra, n. 17.

22 Saunders, John B., Mozley and Whiteley's Law Dictionary, Butterworths, London: 1970, at 97.

23 British North America Act, (1867) 30 & 31 Victoria c. 3, s. 91 (27).

24 (1867) 30 & 31 Victoria c. 3.

25 supra, s. 96, 97, 98, 99, 100.

26 supra, s. 133.

27 Supreme Court Act, R.S.C. 1970, c. 259, s. 3.

28 supra, s. 4.

29 supra, s. 25.

30 supra, s. 35.

31 supra, s. 47.

32 supra, s. 48.

33 The Judicature Act, R.S.A. 1970, c. 193, s. 3.

34 supra, s. 5.

35 supra, s. 7.

36 supra, s. 15, 16.

37 supra, s. 6.

38 supra, s. 28.

39 supra, s. 26 (b).

40 The District Courts Act, R.S.A. 1970, c. 111, s. 2.

41 The Provincial Court Act, S.A. 1971, c. 86, s. 2.

42 The Surrogate Court Act, R.S.A. 1970, c. 357, s. 13.

43 The Family Court Act, R.S.A. 1970, c. 133, s. 4.

44 supra, s. 4 (2) (c).

45 The Juvenile Court Act, R.S.A. 1970, c. 195, s. 5, 10.

46 supra, s. 11.

47 supra, s. 14.

48 Alberta Rules of Court, Alberta Regulation 390/68.

49 The Bar Admission Course. Civil Prodedure, Volume II, 1973.

50 (1968) 68 D.L.R. (2d) 519 (S.C.C.).

CHAPTER II

THE GENERAL BASIS FOR ACCIDENT LIABILITY

THE LAW OF TORTS

It is generally not considered "fair" that a person should suffer a loss because of harm done to him, intentionally or accidently, by another. If one person injures another, the criminal law can punish him, but this does not restore the victim to his previous condition. Tort law has been developed to do this.

1. The Reason for Tort Liability

Tort law is a relatively new area in our legal system. The first English text-book on the subject did not appear until 1860.[1] The law of torts is designed to restore victims of intentional or accidental harm to their original position as closely as money can. The infliction of intentional harm is not within the scope of this study, and thus will not be considered in the following discussion. "Accidental injuries" are usually placed within the general heading of negligence, and encompass the scope of this

study.

It is thought that, in its beginnings, negligence law was developed to prevent accidents[2] since those who negligently injure someone are required to pay damages, and people would exercise care to avoid liability. Another opinion is that its purpose was to prevent retaliation for wrongs done[3] by providing a remedy in damages through the legal system. A more prevelant suggestion is that tort law was developed to provide compensation for injuries sustained by one person as a result of the conduct of another.[4]

> The study of the law of torts is, therefore, a study of the extent to which the law will shift the losses sustained in modern society from the person affected to the shoulders of him who caused the loss or, more realistically in many fields, to the insurance companies who are increasingly covering the many risks involved in the conduct of business and individual activities.[5]

2. The General Principles of Tortious Liability

Basis of Negligence

The most precise examination of the components of negligence is that of Linden.*

> A cause of action for negligence arises if the following elements are present: (1) the defendant's conduct must be negligent, that is, in breach of

---

* Allen M. Linden is a professor of Law at Osgoode Hall Law School of York University and has written both articles and books on Canadian tort law.

> the standard of care set by the law; (2) the claimant must suffer some damage; (3) the damage suffered must be caused by the negligent conduct of the defendant; (4) there must be a duty recognized by the law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; (6) the conduct of the plaintiff should not be such as to bar his recovery, that is, he must not be guilty of contributory negligence and he must not voluntarily assume the risk.[6]

It is important to note that ". . . negligence is not as might have been thought a state of mind, but conduct --whether it consists in action or omission to act."[7] Negligence depends on the facts in each particular case, and is, in general, the failure to exercise the care demanded by the particular circumstances of the situation.[8]

The Standard of Care

Since negligence depends on the facts of each case, stare decisis is of little assistance in determining the standard of care required for a defendant. Generally the court determines the standard of care by measuring what a reasonable person of ordinary prudence would do in the circumstances.[9] This is an objective standard that examines the conduct of the defendant.

Linden has developed an equation which attempts to simplify the process of determining if the conduct of the defendant exceeds the standard of care. His equation is:

P L = O C

where: P is the severity of the potential harm that will ensue if the accident occurs; L is the likelihood that the harm will culminate; O is the object or purpose of the act in question, and; C is the cost or burden to the defendant to eliminate the hazard.[10]

> If the probability multiplied by the loss is greater than the object times the cost, liability ensues; conversely, if the probability times the loss is less than the object times the cost, the conduct is blameless.[11]

This concept can be best explained by the use of two examples. In Bolton & Others v. Stone,[12] a batsman hit a cricket ball, over a seven foot fence, 100 feet, onto a roadway, and hit and injured the plaintiff. In the ninety years that the cricket pitch was used no one was ever hit in this manner before, although a ball was hit onto the road on about six occasions over a period of thirty years. The House of Lords held that the chance of a person being hit in this manner was very small, and ". . . people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."[13] Lord Reid summized the test as:

> In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, is to create a risk which is substantial . . . . In my judgement, the test to be applied here is whether the risk of damage to a person on the road

> was so small that a reasonable man in the position of the [batsman], considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering that matter I think that it would be right to take into account, not only how remote is the chance that a person might be struck, but also how serious the consequences are likely to be if a person is struck . . . .[14]

In Paris v. Stepney Borough Council,[15] a one-eyed man, working without goggles, was hit by a metal chip in his good eye and became totally blind. The defendant employer was under no duty to provide goggles to its employees. The House of Lords held that the gravity of the possible harm that might arise should influence a reasonable person to take care. Two factors must be considered in negligence: the magnitude of the risk and the likelihood of the injury.

These two cases support Linden's equation. They show that; (1) if the probability of the accident occurring is unlikely or remote, the risk may be unreasonable and one that a reasonable person would not be expected to avoid; and, (2) the gravity of the possible harm is an important element in determining the standard of care.

The Reasonable Person

The reasonable person was first introduced, as the reasonable man, to the law by Baron Alderson in 1856. He said:

> Negligence is the omission to do something which a

> reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[16]

There have since been many descriptions of the attributes of the reasonable person. A Canadian case defines this mythical person thus:

> . . . he is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extrordinary or unusual creature; he is not super-human; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practices. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs.[17]

The reasonable person test is used by the courts to determine liability. It is not what the Judge or Jury would have done in the same circumstances, but is a value judgement based on community standards.[18] The reasonable person is considered to have normal intelligence, an understanding of common knowledge and ". . . to be free both from over-apprehension and from over-confidence."[19] The vague definition allows the standard to be flexible by allowing rules of conduct to change with societal changes[20] and by permitting each case to be decided on its own conditions.

Proximate Cause

Another important question in determining liability is: how closely connected, or linked, must the actual harm incurred by the victim be to the act of the wrongdoer? A great wealth of case law has wrestled with this problem, and many theories have been tested before the present law was developed. Today, the defendant's conduct must be the cause of the plaintiff's loss.[21] How closely connected the conduct of the defendant and the loss or damage to the plaintiff must be is a complex problem. The courts use the foreseeability test to determine this question. The reasonable person is judged by what he ought to foresee and is thus liable for foreseeable occurances if they are negligent. Viscount Simonds stated the relationship between the act and the loss thus:

> For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability . . . that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behavior.[22]

In essence, the test set out that a person is liable for the probable, and foreseeable, consequences of his acts. There are two exceptions, or extensions, to this rule.

Firstly, it is not mandatory that the damage which results occur in the exact way that was foreseen. In Hughes v. Lord Advocate,[23] an eight year old boy, while exploring a work site, tripped over a parafin lamp which was left near a manhole by Post Office employees, causing the lamp to fall into the hole and cause an explosion. The boy fell into the hole, as a consequence of the explosion, and was burnt. The trial held that the respondant was not liable since, although it was foreseeable that children might be injured at the site, the type of accident which happened was not foreseeable, since parafin lamps do not normally explode. The House of Lords reversed this decision and held that the defendant was liable since the type of injury sustained--burning--was foreseeable. Lord Morris of Borth-y-Gest explained the reasoning in the following way:

> The fact that the features or developments of an accident may not reasonably have been foreseen does not mean that the accident itself was not foreseeable. The pursuer was in my view injured as a result of the type or kind of accident or occurrence that could reasonably have been foreseen . . . . I consider that the defenders do not avoid liability because they could not have foretold the exact way in which the pursuer would play with the alluring objects that had been left to attract him or the exact way in which in so doing he might get hurt . . . .[24]

The second exception is one of social policy. "It has always been the law of this country that a tortfeasor takes his victim as he finds him."[25] This means that a tortfeasor

must anticipate that his victim may have some special condition or disability which makes him vulnerable to more serious harm than would be suffered by a person without this special condition. In Smith v. Leech Brain & Co.,[26] as a result of the defendant's negligence, the plaintiff was struck on the lip by a piece of molten metal. The burn was treated as a normal burn. The injury later began to ulcerate; cancer developed and the plaintiff died as a result. The court held:

> The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends on the characteristics and constitution of the victim.[27]

This is generally referred to as the "thin-skull rule," and a person is only required to foresee the type of injury that may be occasioned. It is the misfortune of the tortfeasor, that his victim has some weakened condition, or constitution, because of which he suffers to a far greater degree than could be foreseen.

Custom

A custom is a general practice that has been approved by the community in which it exists. There are many types of communities. There are those which are geographical in

nature, such as a group of people living in a small town; there are cultural communities, such as Italian-Canadians in a large city; there are socio-economic communities, as are sometimes developed in impoverished sections of cities; and there are professional communities, such as those formed by doctors, lawyers, teachers and others. It is the customs developed by the professional community of teachers which are of primary concern for the purposes of this study.

A community can approve a practice that has been performed for a long time. Likewise, it can approve a practice that has been performed by a large number of the members of the community. For example, the teaching profession has customs concerning teaching that have been carried out since historical times, but at the same time, modern customs have developed in recent times by being employed over a wide area and by a large number of the profession.

In law, custom is used to determine the standard of care when the common practice of a special type of situation is being examined. If the defendant's act complies with the general and approved practice in the business or trade, then he can "clear his feet" of negligence.[28] The practice must be one which is approved by the members of the profession which use it, it must be legal, and it must be a reasonable practice. No amount of repetition of a careless

practice will make it any less careless.[29] Custom is not a good defence when the risk of harm is great.[30]

Breach of Statute

Some statutes give directions for the performance of certain acts. Failure to perform these acts may lead to liability. "Failure to perform a statutory duty . . . may also give rise to a right of action in favour of a person suffering damage by reason of the failure."[31] Failure to perform a statutory duty is negligence if it is shown that ". . . there was knowledge of the circumstances giving rise to the duty and a reasonable opportunity to perform it."[32]

To be an appropriate standard for civil cases it must be a safety statute that prescribes a specific safety measure in lieu of the common law's general doctrine of the care exercised by the reasonable person. This assures or forbids a certain state of affairs:

> . . . the benefit of the legislative standard can be invoked only by someone who belongs to the class of persons within the purview of legislative protection and who has sustained the kind of harm which it was the purpose of the act to obviate.[33]

Thus, four criterion must be met in order that a breach of a statute will render an actor liable in negligence. They are:

(1) there must be a breach of the legislation talked about,

(2) the plaintiff must have suffered loss as a result of

this breach,

(3) the plaintiff must clearly be one of those kinds of persons protected by the legislation, and

(4) the legislative purpose must be directed to the kind of accident that happened.

3. Contributory Negligence

Contributory negligence has been defined as:

> . . . a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection, and which is a legally contributing cause, together with the defendant's default, in bringing about his injury.[34]

Negligence here means failure of a person to take reasonable care of his own interest; and contributory means a failure on the part of the plaintiff to avoid getting hurt by the defendant.[35]

In common law, contributory negligence was a complete defence. That is, if a plaintiff was guilty of contributory negligence he was barred from recovering his loss from the defendant. Today, legislation[36] allows a plaintiff who is contributorily negligent to recover a portion of his loss from the wrongdoer.

Children under the age of about seven years are not generally considered able to be charged with contributory negligence,* since it would be wrong to apply adult standards

---

* see Chapter III for a more detailed discussion.

to children. The test for children has been set out by Kerwin, C.J. as:

> It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience.[37]

Voluntary Assumption of Risk

Voluntary assumption of risk occurs when the plaintiff accepts a known danger and thus waives his rights to civil action against the person who causes him harm. The maxim volenti non fit injuria, or no injury is done to one who consents,[38] is used to describe this. Unlike contributory negligence, voluntary assumption of risk is a complete defence which relieves the defendant of the responsibility for the harm done.[39] Fleming gives the reason for its existance as:

> . . . people should remain free to agree to waive their legal rights, at least under conditions of free and informed choice. Such a waiver contemplates, of course, a complete shifting of the legal risk, absolving the defendant from all--not just an apportioned share of--responsibility for resulting injury.[40]

The signing of a consent form by a plaintiff, or by an infant plaintiff's parent, does not necessarily waive the defendant's responsibility for a negligent action on his

part. In medical actions often a waiver form is signed which absolves the defendant from actions for intentional assault. Jolowicz says of this:

> . . . it seems to be generally accepted that the medical practitioner has sufficient legal protection in the consent of the child's parent or gardian . . . [the] child has no action provided that the treatment was reasonably necessary and was given without negligence.[41]

In order for a waiver to relieve the defendant of liability for negligence the waiver must specifically refer to this or ". . . be couched in language which cannot conceivably be construed as referring to strict liability alone, such as a clause exempting the defendant from liability for damage howsoever caused."[42]

Voluntary assumption of risk is a defence used by the defendant, and:

> . . . the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence.[43]

Because voluntary assumption of risk is a complete defence it has stricter requirements of proof and is rarely successful.[44]

4. Professional Negligence

A professional person, such as a teacher, becomes so by a special education or training. The position of

professionals in tort law is special since:

> The practice of a profession, art, or calling which, from its nature, demands some special skill, ability, or experience, carries with it a duty to exercise, to a reasonable extent, the amount of skill, ability, and experience which it demands.[45]

The standard will vary from profession to profession, since each has its own particular degree of knowledge and perfection which it demands from its members. A professional person generally is bound to ". . . exercise that degree of care and skill which is displayed by the average practitioner in that particular profession."[46] This is illustrated by the medical profession where a specialist must display a higher degree of skill than must a general practitioner, when dealing with a patient in that specialty area.[47]

Teachers, because of the special training they require, are professionals. There are though, many specialized areas in teaching, such as, physical education, industrial arts and home economics, which require a more specialized training. Unfortunately, not all schools or school boards are able to employ persons with specialized training in these areas to teach these subjects. There has never been a judicial question which asked whether teachers who do not have specialized training should be held to the same standard of liability as those teachers who do have the specialized training, when they are teaching in the special field. In

a medical case, a chiropractor failed to diagnose a condition of a patient, since he was not trained to diagnose, did not seek assistance to diagnose the condition, and applied a method of treatment which was not the proper treatment for the condition. He was found liable for negligence and Hyndman, J.A. said, in his judgement:

> . . . it seems to me the defendant who held himself out to be, at least, a reasonably prudent and skilful man, . . . His falling short of the knowledge and skill which he should have possessed to diagnose the case, and working in the dark, presuming to deal with it, in effect regardless of the results, constituted negligence for the consequences of which naturally flowing therefrom, he must be held liable.[48]

FOOTNOTES

1 Wright, C.A., "The Province and Function of the Law of Torts," in Linden, Allen M. Studies in Canadian Tort Law, Butterworths, Toronto: 1968, at 1.

2 Linden, Allen M. Canadian Negligence Law, Butterworths, Toronto: 1972.

3 Fleming, John G., An Introduction to the Law of Torts, The Clarendon Press, Oxford: 1969.

4 Wright, supra, n. 1.

5 Wright, supra, at 2.

6 Linden, supra, n. 2, at 5.

7 Fleming, supra, n. 3, at 27.

8 28 Hals (3d) 3, para 1.

9 Fleming, John G., The Law of Torts, fourth edition, The Law Book Company Limited, Australia: 1971.

10 Linden, supra, n. 2.

11 Linden, supra, at 8-9.

12 [1951] 1 All E.R. 1078 (H.L.).

13 supra, at 1084.

14 supra, at 1086.

15 [1951] 1 All E.R. 42 (H.L.).

16 Blyth v. Birmingham Water Works Co. (1856) 11 Ex. 781.

17 Arland and Arland v. Taylor [1955] 3 D.L.R. 358 (Ont. C.A.).

18 Linden, supra, n. 2.

19 Glasgow Corporation v. Muir [1943] A.C. 448, at 457.

20 Fleming, supra, n. 3.

21 Linden, supra, n. 2.

22 Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. Wagon Mound (No. 1) [1961] 1 All E.R. 404 (P.C.) at 413.

23 Hughes v. Lord Advocate [1963] 1 All E.R. 705 (H.L.)

24 supra, at 711.

25 Smith v. Leech Brain & Co. [1961] 3 All E.R. 1159 (Q.B.) at 1161.

26 [1961] 3 All E.R. 1159 (Q.B.).

27 supra, at 1161.

28 Vancouver General Hospital v. McDaniel [1934] 4 D.L.R. 593 (P.C.).

29 Ware's Taxi Ltd. v. Gilliham [1949] 2 D.L.R. 721 (S.C.C.).

30 Paris v. Stepney Borough Council [1951] 1 All E.R. 42.

31 28 Hals. (3d) 6, para 3.

32 Slaney v. City of Sydney (1919) 46 D.L.R. 164, affirmed 50 D.L.R. 351.

33 Fleming, supra, n. 3.

34 Fleming, supra, n. 9.

35 Flening, supra, n. 9.

36 Contributory Negligence Act, R.S.A. 1970, c. 65.

37 McEllistrum v. Etches [1956] S.C.R. 787, at 793.

38 Saunders, John B., Mozley and Whiteley's Law Dictionary, Butterworths, London: 1970, at 381.

39 Fleming, supra, n. 9.

40 supra, at 240.

41 Jolowicz, J.A., Lewis, T. Ellis, and Harris, D.M., Winfield and Jolowicz on Tort, ninth edition, Sweet & Maxwell, London: 1971.

42 Fleming, supra, n. 9, at 241.

43 Lehnert v. Stein (1963) 36 D.L.R. (2d) 159, at 164.

44 Fleming, supra, n. 9.

45 28 Hals. (3d) 19, para 17.

46 Glos, George E., "Torts--Doctrine of Professional Negligence--Standard of Professional Care," (1963) 41 Can. Bar Rev. 140, at 142.

47 Challand v. Bell (1959) 18 D.L.R. (2d) 150, at 154.

48 Gibbons et al. v. Harris [1924] 1 W.W.R. 675 (Alta. S.C.A.D.), at 706.

CHAPTER III

THE POSITION OF CHILDREN IN THE LAW OF TORTS

This chapter will deal with the position of children in the general law of torts. It is intended that the reader will be provided with a basic background so that detailed explanations of these concepts need not be included in the following discussion of the law in relation to teacher liability, which by necessity includes children.

1. The Status of Children in Tort Law

The Standard of Care

Children, or infants as they are called in law, have a "special position" in tort law and are not required to live up to the standard normally expected from the reasonable adult person. Infants, like lunatics, are considered apart from the reasonable or normal person because of their lesser capacity to form an intention to act, or to understand the consequences of their actions.[1]

This special position has a twofold effect on the

relationship of children and adults with regard to tort law. Firstly, in the law of negligence, children generally are owed a higher standard of care from adults.[2] "The care which should be exercised by a reasonably careful man will be greater when the circumstances call for special care."[3] Circumstances that call for special care include the known, or reasonably anticipated, presence of children. Because children do not always act in as patterned a manner as adults, greater care must be taken.

> Children, wherever they go, must be expected to act upon childish instincts and impulses, and those who are chargeable with a duty of care and caution towards them, must calculate upon this and take precaution accordingly.[4]

Secondly, children, by their very nature, present a risk of harm to other children, and adults, because they are not able to appreciate the nature and consequences of their acts. The dangerous propensity of childhood was expressed by Kitto, J. as:

> . . . children, like everyone else, must accept as they go about in society the risks from which ordinary care on the part of others will not suffice to save them. One such risk is that boys of twelve may behave as boys of twelve; and that, is a risk indeed.[5]

Children as Tortfeasors

It is settled law that children are liable for their own torts in the same manner as are adults.[6] It is felt

that:

> . . . tort law has evinced some ambivalence, vacillating between protection for the children, on the one hand, and for their victims, on the other. . . . Clearly, youth need a buffer against tort liability for its indiscretions, but the law cannot grant them a license to injure and maim at will.[7]

One major difficulty in determining the liability of an infant defendant is in determining at what age a child has the capacity to appreciate the nature and consequences of his acts. Tort law is without legislative aid in this respect.[8] Some assistance may be had from the Age of Majority Act,[9] which states:

> 1. (1) Every person attains the age of majority and ceases to be a minor on attaining the age of 18 years.

The Criminal Code[10] of Canada offers a guideline from its expectations of the capacity of children in relation to criminal matters. Two sections that deal with this are:

> 12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.
>
> 13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

These statutes, while defining the age at which children legally become adults, and at which age they can have the capacity to understand their actions, do not define the age

of responsibility for the acts of children in respect to tort law.

The age of responsibility has been developed by the case law. It appears that young children are absolved from responsibility, while those who approach the age of adulthood are liable for their acts. A three year old child, who injured an infant baby by removing her from her carriage and dragging her over 100 feet, was held not liable. It was felt that a child of three did not have the mental ability to appreciate the real nature of his acts, also that he would tend to imitate the acts of those around him rather than make his own decisions.[11]

A five year old, who shot a playmate in the eye with an arrow, was held not to have "reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts."[12] In a case in which two children were killed when they unlawfully walked on railway tracks to school, it was held that:

> Children aged seven and nine years have by the common law the benefit of something in the nature of a presumption that they have not sufficient capacity to know that they are doing wrong.[13]

A boy of twelve years of age was held not to appreciate that any risk was involved to a nine year old girl, when he tried to throw a sharpened steel spike into a wooden post. The spike glanced off the post and hit the girl, who was

standing four or five feet to his left, in the eye.[14] On the other hand, a thirteen year old boy of "normal intelligence" was held liable when he threw nitric acid on a twelve year old girl.[15] Likewise, a thirteen and a half year old boy was found liable for shooting a friend with a .22 calibre rifle which he was carrying around in his home while his friend was visiting him. The court found:

> Having regard to the boy's age--13 1/2 years--his prior experience . . . the nature and degree of instruction received by him . . . and his intelligence . . . the infant defendant was capable of realizing the probable consequences [of his action].[16]

It appears that as children get older they are more likely to be considered to know and appreciate the risks and consequences that may arise from their actions. There is a difference in the mental capacity of different children of the same age, as there is between children of different ages.

> . . . there is no hard and fast rule as to what may in civil matters be regarded as the years of discretion. One child at ten years may have more descretion or common sense than his brother at fifteen.[17]

The age of the child is not, therefore, the only criterion that courts consider in assessing the liability of children as tortfeasors. What then, are these other criterion?

The Test for the Liability of Children

The test used to determine when a child is liable in negligence is set out in a Canadian case, McEllistrum v. Etches.[18] This test asks whether the child "exercised the care expected from a child of like age, intelligence and experience."[19] Thus, the other factors that are included, along with age, are the intelligence and the experience of the child.

This test has been modified to include the child's capacity to understand the danger,[20] the "nature and degree of instruction received" in the activity,[21] participation in other activities that would develop a "knowledge of the necessity of taking precautions,"[22] and the child's knowledge of the circumstances.[23]

The other factors in the test, namely intelligence and experience, are used to assist courts in determining when a child is capable of understanding his actions to such a degree that he may be held liable for them. Children are not expected to act and react as adults do in a given situation. Nor are they expected to have the capacity to understand or foresee the consequences of their acts. This has been recognized and articulated by the courts.

> In regard to the things which pertain to foresight and prudence--experience, understanding of causes and effects, balance of judgement, thoughtfullness --it is absurd, indeed it is a misuse of language,

> to speak of normality in relation to persons of all ages taken together. In those things normality is, for children, something different from what normality is for adults; the very concept of normality is a concept of rising levels until "years of discretion" are attained.[24]

Special consideration in determining the liability of children makes sense, since they usually act like children.

> . . . however, when a young person is engaged in an adult activity, which is normally insured, the policy of protecting children from ruinous liability loses its force. Moreover, when the rights of adulthood are granted, the responsibilities of maturity should also accompany them.[25]

As children approach the age of majority, they assume more adult activities, such as driving automobiles, which may render them liable in negligence. The adult test of the reasonable person is applied to older children who are engaged in adult activities.[26] At what age, then, are children liable to be sued and to sue in tort?

Capacity of Children to Sue and be Sued

The liability of children is the same as that of an adult--they can be sued if they are old enough to form the intent to do the act.[27] A child can be held liable in damages just as if he were an adult,[28] but "children as defendants are rarely worth powder and shot."[29] Infants generally have no assets and thus are not worth suing,[30] since the plaintiff may be unable to recover any damages

that are awarded.*

A child may sue, for injury caused to him, in the same manner as an adult, except he must sue by way of his "next friend."[31] A child may even sue his parents in tort, but the real defendant will be an insurance company.[32] This has been held in a Canadian case in which an eleven year old boy was injured while riding on his father's carnival "ride."

> . . . a child is not disentitled from bringing an action and recovering from his parents, even where he lives with the parent and is depending on him for support. . . . it occurred to me that a situation such as this could only arise where insurance is involved . . . . I know of no case in our Courts dealing with the point, but I have no doubt that the law as it has been decided in Young v. Rankin [1934] S.C. 499, a Scottish case, is also the law of Ontario. I subscribe to the view of Lord Fleming in that case, where he said at the end of his remarks at p. 520: "I do not think that a wrongdoer should be relieved from responsibility for the consequences of his negligence merely because the injured party happens to be his own child."[33]

Children, while they have special rules to determine their liability by evaluating their age, intelligence and experience, have a higher duty of care owed to them, but at the same time can be held liable for their own acts in

---

* A judgement may be awarded against a child who has no finances at the time of the trial. The plaintiff can, by a legal process, keep the judgement renewed until the child tortfeasor reaches the age of majority and is able to earn money to pay the judgement against him.

relation to others. They can sue others, and be sued in court, as adults. "The disposition of children of tender years to mischief has given their elders nearly as much trouble in the law courts as outside them . . . ."[34]

2. The Position of Parents in Relation to their Children

The Duty of Parents

Parents have a common law duty to care for their children. This duty includes exerting control over children to protect them from harm, and to protect others who may foreseeably suffer harm at the hands of the children.[35] There is a duty on parents, and those standing in loco parentis--in the place of parents--to take care of a child who is too young to care for himself.[36]

> This is a personal, not a vicarious, liability. The parental duty arises because the parent-child relationship gives the parent a power over the child. Where it exists, a parent's duty to supervise and control the conduct of his child, in order to prevent harm to others, is one of the rare instances of an imposition by the common law of a duty of affirmative action.[37]

The parental duty, or affirmative action, imposed is, to supervise and control the children by using reasonable care according to the circumstances.[38] The parent may be expected to take "precautions which are reasonably necessary in the circumstances"[39] to preclude a foreseeably harmful course of conduct by his child. In general:

> . . . the common law insists that parents at least exercise reasonable care, commensurate with their peculiar ability to keep their offspring under discipline and supervise their activities for the sake of public safety.[40]

Thus, the standard of care required of parents, is to use reasonable care with regards to the practices and usage prevailing in the community.[41]

This parental duty, therefore, must, because of its wide definition, be ascertained by the courts for each particular fact situation that arises. The duty is flexible and can include as many elements as are required to arrive at a decision on the case. Some of the elements that have been included are: the parents must know the propensity of a particular child to misbehave;[42] parents are expected to realize that children meddle with attractive things that may cause harm;[43] parents are expected to know of and take the proper precautions in regards to their children's activities;[44] and parents must give proper instruction to children in the use of dangerous things.[45]

Possible, because of the greater range of activities of children in present day society, legislatures have imposed statutory duties on parents, in regards to the control of their children. Two Alberta statutes that impose such duties are, the Highway Traffic Act,[46] which states:

> 213. In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle upon a highway,
>
> (a) a person driving the motor vehicle and living with and as a member of the family of the owner thereof . . . .
>
> shall be deemed to be the agent or servant of the owner of the motor vehicle and to be employed as such, and shall be deemed to be driving the motor vehicle in the course of his employment . . . .

and The School Act,[47] which has the following section:

> 167. (1) Where property of a board is destroyed, damaged, lost or converted by the intentional or negligent act of a pupil, the pupil and his parents are jointly and severally liable to the board in respect of the act of the pupil.

"A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option."[48] The effect of these statutes is twofold. Firstly, they allow the injured party access to the insurance[49] or assets of the parents, and secondly, they impose a duty on parents to control the activities of their children, giving regard to the safety of other persons and their property.

Parents are jointly responsible for their children, but the cases show that often only one parent, the one in proximity to the children, has the duty towards them. It has been held that the mother is normally in a better position to supervise and control the conduct of young children,[50] when both the mother and pre-school children are at home together

during the day. The cases indicate that the father probably has control over teenagers[51] and older children who are using weapons.[52] The power of the parents over their children diminishes as the children reach eighteen years of age, and usually ceases when the children leave home.[53]

Liability of Parents for the Acts of their Children

Generally, parents are not liable for the torts committed by their children. There are two exceptions to this rule:

(1) A parent is liable when the child is employed by his parents and commits a tort in the course of his employment.[54] This includes statutory imposed vicarious liability such as is found in The Highway Traffic Act.

(2) A parent is liable if the tort is due to:

> . . . the parent's negligent control of the child in respect of the act that caused the injury, or if the parent expressly authorised the commission of the tort, or possibly if he ratified the child's act.[55]

The test used to determine if a plaintiff will succeed in an action against the parents was set down in Streifel v. S., B. and G.[56] In this case, three boys, two of them fourteen and one fifteen years of age, stole and damaged the plaintiff's car. In deciding if the plaintiff should succeed against the parents, Whittaker, J. said:

> In order to succeed in his claim against the parents the plaintiff must show that the boys had a propensity to steal; that this propensity was known to the parents; that the parents should reasonably have anticipated that the boys might steal a car; that there was some reasonable step the parents could have taken to prevent this particular theft, which they negligently failed to take.[57]

This four point test has been extended in its application. Alexander has suggested that there is a dual meaning to "propensity" which affects this test. He says that the:

> . . . distinction is between a propensity common to most children in a certain age-group, of which parental knowledge is assumed, and a propensity peculiar to a particular child, of which parental knowledge is not assumed, but must be proved by the plaintiff.[58]

Thus all parents are assumed to have the knowledge that their children will act as normal or average children of their age, intelligence and experience. On the other hand, it may be that a parent has no knowledge of a particular propensity that his child exhibits. If this is the case, and the plaintiff cannot show they should have had such knowledge, nor that they should have foreseen the acts of the child, the plaintiff will fail in his attempt to impose liability on the parents.

The parents in Streifel v. S., B. and G. were found not liable, since the boys did not have a previous propensity to steal. A mother was found not liable in buying her fifteen and a half year old son a shot gun, since he had

been shooting for years.[59] The parents of a thirteen year old boy, who threw nitric acid on a twelve year old girl, were held not liable since they did not know the child had the dangerous substance in his possession, and they did not know that he could obtain it, nor that he had done so, and had hidden it from them.[60] A father, along with his thirteen and a half year old son, was held liable for the shooting of the son's friend. The court found the father liable since the:

> . . . responsibility of the parent depends not only on whether he took reasonable precautions to prevent the boy using the gun at all, but also upon the precautions which are reasonably necessary in the circumstances to preclude the dangerous use of it.[61]

The parents then, are liable for injuries to the plaintiff if they negligently failed in some manner to prevent the child's tortious act from being committed. This failure can occur by not knowing the common or peculiar propensities of their child, by failing to forsee or to anticipate the child's tortious act, or by failing to prevent the occurrence of the act.

Liability of Those in the Place of Parents

School teachers are one of that class of persons who stand in loco parentis--in the place of parents--to children. The teacher, acting in the place of the parent, "assumes some of the rights which a parent would ordinarily

exercise if he were present."[62] A ". . . person who, as a parent, has the control of a child is responsible for negligence in the exercise of that control if injury results."[63] Teachers have both authority over, and responsibility towards the pupils in their care.[64] This is a common law authority and:

> . . . the authority of the school master is, while it exists, the same as that of the parent. A parent, when he places his child with a schoolmaster, delegates to him all his own authority, so far as it is necessary for the welfare of the child.[65]

It has been settled law, since Lord Esher expressed the duty of a teacher, in Williams v. Eady,[66] as, "the schoolmaster was bound to take such care of his boys as a careful father would take of his boys."[67] This definition may not be as applicable today since a teacher has many more pupils in his class, than a reasonable parent would have in his home. This opinion has been articulated in a recent Canadian case, where Ritchie, J. said:

> While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that . . . in the improvised gymnasium, is one to which Lord Esher's words do apply.[68]

The number of pupils in a teacher's care should be taken into account in determining the "reasonable care" expected

from the teacher.[69]

The special knowledge of teachers, as compared with the knowledge attributed to the average parent, also affects the duty required of them. A teacher who knew that a game, such as grass hockey, was not dangerous in itself, and that eleven year old boys were capable of playing it unsupervised, was found to be not negligent when one child was injured by another during an unsupervised game.[70] The teacher's knowledge of the game and of the abilities of the children were considered in this case as special knowledge. In another case, it was held that to hold a teacher with special knowledge in physical education, to the standard of the careful parent, would be to determine his liability "according to a lower standard of care than that by which it should . . ."[71] be judged.

A teacher has a duty similar to the parents in regards to the care of children. This duty has been modified to account for the special training of the teachers, and the large number of pupils in their control.

3. Contributory Negligence of Children

Concessions to immaturity are allowed in the assessing of contributory negligence when the plaintiff is an infant.[72] Generally, the standard of care required from a child is

different to that expected from an adult. "There is a strong policy in favor of protecting children from losses attributable to their immaturity."[73] The law has been ready to find remedies for children's injuries, but it cannot allow them to have no duty of self protection.[74]

> There is a responsibility on every person, infant or adult, to exercise some degree of care for his or her safety. While the weight of such responsibility will vary as between one individual and another, nevertheless some responsibility attaches and that responsibility must be weighed in the light of the circumstances of each case.[75]

Why is this difference in duty found? It has been held that at some stages in life, a differance of one year in age matters very little, ". . . but in youth and early manhood when knowledge is rapidly blossoming, a twelve-month is a very long time."[76] Age, though, is not the only criterion considered in the determination of contributory negligence of children. The test was set by the Supreme Court of Canada, in McEllistrum v. Etches.[77] The court held:

> It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience.[78]

This test allows a minimum standard of performance for children, which can be presumed to exist in a child for which no claim of inferiority is made.[79]

There is no set age, as in Criminal Law, at which normal children become capable of being contributorily negligent. Usually though, children under six or seven years of age are not held to be contributorily negligent.[80] Each case is determined on its own facts. The age, intelligence and experience of the child are examined, and it is decided if this particular child acted, in the given circumstances, to the degree of care expected of children with similar average age, intelligence and experience.[81] An examination of the cases shows this process of evaluation.

In three Canadian cases that involved five year olds, two courts found no contributory negligence, but one case held the child guilty of contributory negligence. A boy, six days under five years of age, who ran from behind a parked car, on a residential street and was hit by a car, was found not guilty of contributory negligence because of his young age. However, the trial decision which found a boy of five years and three months of age, seventy per cent responsible for his injuries, which were received when he rode his bicycle into an intersection and was hit by a car, was reversed by the Court of Appeal, in Sheasgreen et al. v. Morgan et al.[82] The court held that ". . . mere age is not in itself the test, but rather the capacity of the infant to understand and appreciate . . ."[83] the danger.

In discussing the test in relation to the boy the court found:

> . . . having regard to his tender years, his meagre education, his want of experience, and the irresponsibility of the normal boy of five. . . . the infant was not guilty of contributory negligence . . . What possible understanding could a lad of his years have with regard to an arterial highway, even if there was a Stop sign which, of course, he could not read? The answer is, none.[84]

In Messenger et al. v. Sears and Murray Knowles, Ltd.,[85] a girl, five years and nine months old, was hit by a car when she crossed the heavily travelled street on which she lived, after getting out of a car and running behind it. The girl was of average intelligence and brightness. Despite her young age, the court found her sixty-five per cent responsible for her own injuries. The court gave its reasons as:

> It is, I think, highly probable that the child would have learned from her older brothers and sisters, if not from her parents, as well as from her own experience, to appreciate the risks involved in running into a vehicular traffic pathway on this street in the circumstances disclosed in this case and that care--much more care than the infant plaintiff showed--in the avoidance of such risks would be expected from a child of like age, intelligence and experience.[86]

These three cases involved five year olds, all of whom were average in intelligence. The one who was found capable of contributory negligence was deemed to have been so because of her experience. The court felt that since she lived on

the busy street, she should have been familiar with its hazards and the safety measures she should have taken to avoid the accident. There are two other factors that may have had some bearing on the case, although they were not mentioned in the judgements. The child was closer to being six years of age than five years. This difference in the ages may make a difference since children learn very rapidly in early childhood. The second factor is, the child was a girl. Does this case exemplify the belief that girls mature, in their social and mental capacity, faster than boys of equal age? Since most cases involve boys, it would be difficult, if not impossible, to pursue this argument to its full extent, thus it remains a question.

Two cases involving six year olds were decided by examining the experience of the infants involved. In Sample et al. v. Klassen,[87] a six year old boy was hit by an approaching car, when he jumped from and ran behind his father's car, to cross the street to meet school friends. The boy was found not to be guilty of contributory negligence since he had previously been driven to school and not allowed to walk with his friends and ". . . there was no evidence of parental or other instruction to Wayne touching the rules of the road and his own responsibility in crossing the street."[88] Thus the boy did not have the

experience required to allow him to safeguard himself from traffic accidents. Another six year old boy was found to have been contributorily negligent, and thus liable for twenty-five per cent of his injuries. In Whitehouse et al. v. Fearnley,[89] the boy was riding his tricycle home, at 5 p.m., on a highway, and was hit by a car, when he tried to cross the highway to enter his laneway. The court applied the test and found:

> The infant plaintiff . . . to be a bright child of better than average intelligence. He had used the tricycle for over one year. His elder brother had taught him to ride and he had been told when riding to keep to the right of the highway and face oncoming traffic, and generally the infant plaintiff did so.[90]

The child thus had the necessary experience to take the required precautions for his own safety, but he did not ". . . exercise that degree of prudence which might reasonably be expected from him."[91] Because of his experience, he should have known that his actions were dangerous.

In two cases involving seven year old boys, contributory negligence was not found. In Jones v. Lawrence,[92] a seven year and three month old boy, on his way to a fun fair, was hit by a motorcycle when he ran out onto the street from behind a parked van. The infant plaintiff was normal in intelligence and had been taught road safety.

Despite this, the English court held the boy innocent of liability since:

> . . . if a child of that age wants to get anywhere, he will forget all he has been taught. . . . such children do not remember if something else is uppermost in their minds.[93]

This reasoning seems only to support the determination of the court to exculpate the boy from charges of contributory negligence. The major reasoning behind the decision appears to be the negligence of the defendant, who was travelling at 50 m.p.h. in a 30 m.p.h. zone, near a school. The court found that the defendant's speed materially caused the accident since he eliminated his opportunity of avoiding hitting the boy.

The difficulty of deciding whether a seven year old child is guilty of contributory negligence is shown by the Canadian case, Weidl v. Karesa and Sherbanowski.[94] In this case, a seven and a half year old boy, alighted from a car on the highway across from his home, ran around behind it to cross the highway, and was killed by an approaching car. The court found that the defendant driver was negligent for two reasons. Firstly, she did not slow down and did not sound a warning with the car's horn, when she saw the parked car, two persons standing beside it, and the lane on the opposite side of the road; and secondly, she was travelling at too great a speed as evidenced by the distance

it took to come to a stop after hitting the boy. The court then discussed the possibility of contributory negligence by the child:

> This is just about the age that is usually taken as a dividing line between those who are capable of being charged with negligence and those who are too young to have such a charge made against them. It is not a clear line of demarcation: other factors must be taken into account. The deceased lad was, apparently, of average mental development and intelligence; he was physically active and healthy. He was in second grade at school. That he was impulsive and impetuous is evidenced by the tragedy. He was not, so far as can be surmised, a thoughtful youngster. He had been well brought up and in particular had been warned about traffic dangers. Also he knew this road quite well. It was a busy one. I consider him a borderline case . . . .[95]

Despite the boy's age, normal intelligence and experience in regards to that particular road and the traffic on it, the court decided ". . . I find as a fact (not without some doubt) that he should be exonerated from such negligence by reason of his childhood."[96] In both of these cases, in which the child was of an age where contributory negligence could be found, the deciding factor was not the actions of the child, but the negligence of the defendant.

It is important to note that in Messenger, where a five year old was found contributorily negligent, in circumstances much like those in Weidl, was decided four years after Weidl. Also, there was no finding of negligence on the part of the defendant in Messenger, a fact

that was deemed to be important in the earlier case.

Age seems more important in the determination of contributory negligence when the child is over seven years. While on the other hand, for children under seven, of normal intelligence, the experience of the child in activities related to the accident seems to be a more important factor in the determination of contributory negligence. As the cases exhibit, each case is determined by applying the test to its own particular facts.

Formerly the standard of care of the child was relevant only to determine whether there was negligence or not, since contributory negligence was a complete defence. Today it also bears on apportioning damages.[97] Thus if it is found that a child is guilty of contributory negligence, his recovery in damages from the defendant will be proportionately reduced.

4. Occupier's Duty Towards Children

There is a common law duty, in most Canadian provinces, owed by occupiers of premises, such as school boards, towards those who come upon it. The common law is being changed by statute in some provinces. There are three classes of visitors:

(1) Invitee, or one who ". . . is a lawful visitor from whose visit the occupier stands to derive an economic

advantage."[98] "The general rule is that in ordinary circumstances the relation of a pupil on the school premises to the education authority is that of invitee and invitor."[99]

(2) Licensee, or one who is a lawful visitor from whose visit the occupier derives social pleasure.[100]

(3) Trespasser, or anyone who enters ". . . someone else's land without consent or privilege."[101]

The duty of an occupier towards each of these classes of visitors varies. The occupier must use reasonable care to prevent damage to an invitee from any unusual danger, of which he knows, or ought to know; the occupier need warn a licensee only of concealed dangers that are known to him; to the trespasser, the occupier owes the duty not to set deliberate traps to cause him harm.[102]

These classes of visitors can be changed when the visitor is a child. The general change occurs when a child trespasser is "induced" to enter another's land because of some attractive item, or allurement. An allurement is an object of fascination to children which is, at the same time, dangerous.[103]

> The function of the doctrine of allurement is, when the circumstances warrant, to give to a child who, in reality, is a trespasser, the status of a licensee; and concomitantly to impose on an occupier the duty of care of a licensor in such measure as is appropriate towards the child.[104]

In order to rely on the existence of an allurement, a child

must be ". . . old enough to be fascinated by it while immature enough to be unable to appreciate the danger it creates."[105] The age limit generally placed on children who are allowed to be attracted by allurements, appears to be seven.[106]

The common law does not impose a duty on occupiers to prevent trespassors, either child or adult, from entering their land. Trespassors, generally, have no right to complain of the condition of premises, on which they are trespassing.[107] This position is changing, and children are beginning to receive some protection by statute. In Alberta, The Occupiers' Liability Act,[108] illustrates this by the following section:

> 13. (1) Where an occupier knows or has reason to know
>
> (a) that a child trespasser is on his premises, and
>
> (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,
>
> the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.
>
> (2) In determining whether the duty of care under subsection (1) has been discharged consideration shall be given to
>
> (a) the age of the child,
>
> (b) the ability of the child to appreciate the danger, and
>
> (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.
>
> (3) For the purposes of subsection (1), the

> occupier has reason to know that child trespassers are on his premises if he has knowledge of facts from which a reasonable man would infer that children are present or that their presence is so probable that the occupier should conduct himself on the assumption that they are present.

When the occupier of premises is a school board ". . . the general rule is that in ordinary circumstances the relation of a pupil on the school premises to the education authority is that of invitee and invitor, . . ."[109] This relationship of invitee and invitor usually applies in those hours adjacent to school hours when teachers are present on the school premises. When a child plays on the school premises after the normal school hours, when teachers would be present, his status has been held to be that of a licensee.[110] In one case a boy who disobeyed instructions to stay away from a construction area on the school grounds, played ball there, and was hurt. The judgement reduced the status of the boy to that of a trespasser for the following reasons:

> I find that any invitation to use that portion of the play ground necessary for the construction of the addition and the assembly of material and machinery was withdrawn to [the plaintiff's] knowledge and that he was not an invitee at that time or place.
>
> I find also that he was not a licensee at that time and place . . . .
>
> In ordinary circumstances the pupils whose earlier attendance was acquiesced in would be licensees but that would not be so in a case where the area in question was barred to them . . . . In my opinion . . . [the plaintiff's] position at that time and

place was that of a trespasser.[111]

With the exception of the Alberta Occupiers' Liability Act, the duty of care normally attached to the classes of visitors remains the same when the occupier is a school board and the visitor is a student..

FOOTNOTES

1 Fleming, John G., The Law of Torts, The Law Book Company, Sydney: 1971.

2 Jewers, G.O., "Damages Suffered by Children--The Standard of Care Owed to Children", Isaac Pitblado Lectures on Continuing Legal Education, 1970, The Law and the Minor, at 49.

3 Goold et al. v. Gill Interprovincial Lines Ltd. and Sasley [1969] 70 W.W.R. 687 (Man. Q.B.) at 689.

4 Seamone v. Fancy [1924] 1 D.L.R. 650, at 652.

5 McHale v. Watson [1966] 39 A.L.J.R. 459 (H.Ct. Aust.).

6 Walmsley v. Humenick [1954] 2 D.L.R. 232 (S.C.C.).

7 Linden, Allen M., Canadian Negligence Law, Butterworths, Toronto: 1972, at 28.

8 Linden, supra, n. 7.

9 The Age of Majority Act, S.A. 1971, c. 1.

10 Criminal Code, R.S.C. 1970, c. C-34.

11 Tillander v. Gosselin [1967] 1 O.R. 203 (Ont. H.Ct.).

12 Walmsley, supra, n. 6.

13 The Acadia Coal Company Limited v. Angus MacNeil [1927] S.C.R. 497, at 504.

14 McHale, supra, n.5.

15 Pollock et al. v. Lipkowitz et al. [1971] 17 D.L.R. (3d) 766 (Man. Q.B.).

16 Hatfield v. Pearson (1956) 17 W.W.R. 575 (B.C.S.C.), at 581.

17 Tabb v. Grand Trunk Ry. Co. (1904) 8 O.L.R. 203 (C.A.), at 208.

18 [1956] S.C.R. 787.

19 supra, at 793.

20 Sheasgreen et al. v. Morgan et al. [1952] 1 D.L.R. 48 (B.C.S.C.).

21 Hatfield, supra, n. 16, at 581.

22 Schade and Schade v. Winnipeg School District No.1 and Ducharme (1959) 28 W.W.R. 577 (Man. C.A.), at 580.

23 supra.

24 McHale, supra, n. 5, at 464.

25 Linden, supra, n. 7, at 33.

26 Linden, supra, n. 7.

27 Tillander, supra, n. 11.

28 Walmsley, supra, n. 6.

29 Fleming, supra, n. 1, at 597.

30 Heuston, R.F.V., Salmond on the Law of Torts, sixteenth edition, Sweet & Maxwell, London: 1973.

31 Jolowicz, J.A., Lewis, T. Ellis, and Harris, D.M., Winfield and Jolowicz on Tort, ninth edition, Sweet & Maxwell, London: 1971.

32 Heuston, supra, n. 30.

33 Deziel et al. v. Deziel [1953] 1 D.L.R. 651 (Ont. H.Ct.), at 653-54.

34 Jolowicz, supra, n. 31, at 195.

35 Alexander, E.R., "Tort Responsibility of Parents and Teachers for Damage Caused by Children," (1965-66) XVI U.T.L.J. 165.

36 Carmarthenshire County Council v. Lewis [1955] 1 All E.R. 565 (H.L.).

37 Alexander, supra, n. 35, at 165.

38 Alexander, supra, n. 35.

39 Hatfield, supra, n. 16, at 582.

40 Fleming, supra, n. 1, at 147.

41 Fleming, supra, n. 1.

42 Streifel v. S., B. and G. [1957] 25 W.W.R. 182 (B.C.S.C.).

43 Alexander, supra, n. 35.

44 Hatfield, supra, n. 16.

45 Heuston, supra, n. 30.

46 R.S.A. 1970, c. 169.

47 R.S.A. 1970, c. 329.

48 Black, Henry Campbell, Black's Law Dictionary, fourth edition, West Publishing Co., St. Paul, Minn.: 1968, at 972.

49 Fleming, supra, n. 1.

50 Walmsley, supra, n. 6.

51 Alexander, supra, n. 1.

52 Hatfield, supra, n. 16.

53 Alexander, supra, n. 35.

54 Jolowicz, supra, n. 31.

55 supra, at 613.

56 (1957) 25 W.W.R. 182 (B.C.S.C.).

57 supra, at 183-84.

58 Alexander, supra, n. 35, at 168.

59 Heath v. Green and Green [1941] 1 W.W.R. 601 (Sask. K.B.).

60 Pollock, supra, n. 15.

61 Hatfield, supra, n. 16, at 582.

62 McCurdy, Shelburne G., The Legal Status of the Canadian Teacher, The MacMillan Co. of Canada Ltd., Toronto: 1968, at 130.

63 Smith v. Leurs (1945) 70 C.L.R. 256 (H.Ct. Aust.), at 259.

64 Gray v. McGonegal [1952] 2 S.C.R. 274.

65 Fitzgerald v. Northcote and Another (1865) 4 F & F 656 (Q.B.), at 689.

66 (1893) 10 T.L.R. 41 (C.A.).

67 supra, at 42.

68 McKay v. Bd. of Govan School Unit No. 29 (1968) 68 D.L.R. (2d) 519 (S.C.C.), at 523.

69 Dyer (Otherwise Venables) et al. v. Board of School Commissioners of Halifax [1956] 2 D.L.R. (2d) 394 (N.S.S.C.).

70 Gard v. Board of School Trustees of Duncan [1946] 2 D.L.R. 441 (B.C.S.C.).

71 McKay, supra, n. 68.

72 Shulman, Harry, "The Standard of Care Required of Children," (1927-28) 37 Yale L.J. 618.

73 supra, at 619.

74 Fleming, supra, n. 1.

75 Schade, supra, n. 22, at 583.

76 Kefry v. Carter [1969] 1 W.L.R. 1372 (C.A.), at 1377.

77 [1956] S.C.R. 787.

78 supra, at 793.

79 Shulman, supra, n. 72.

80 O'Sullivan, J.F., "Infants and Contributory Negligence," Isaac Pitblado Lectures on Continuing Legal Education, 1970, The Law and the Minor, 38.

81 supra, n. 80.

82 [1952] 1 D.L.R. 48 (B.C.S.C.).

83 supra, at 61.

84 supra, at 62.

85 (1960) 23 D.L.R. (2d) 297 (N.S.S.C.).

86 supra, at 300.

87 (1970) 72 W.W.R. 284 (Man. Q.B.).

88 supra, at 290.

89 (1956) 47 D.L.R. (2d) 472 (B.C.S.C.).

90 supra, at 476-77.

91 supra, at 477.

92 [1969] 3 All E.R. 267 (Warwickshire Assizes).

93 supra, at 270.

94 (1956) 18 W.W.R. 633 (Man. Q.B.).

95 supra, at 638.

96 supra, at 639.

97 Fleming, supra, n. 1.

98 Harris, Edwin C., "Occupiers' Liability in Canada," in Linden, Allen M., Studies in Canadian Tort Law, Butterworths, Toronto: 1968, at 253.

99 Schade v. Winnipeg School District No. 1 and Ducharme (1958) 27 W.W.R. 546 (Man. Q.B.), at 548.

100 Fleming, supra, n. 1.

101 supra, at 400.

102 Fleming, supra, n. 1.

103 Wilkins, L. David, "The Future of Occupiers Liability To Trespassers in Canada," (1965-66) 4 Alta. L. Rev. 447.

104 Paskivski et al. v. Canadian Pacific Limited et al. [1973] 4 W.W.R. 580 (Alta. S.C.A.D.), at 584-85.

105 Wilkins, supra, n. 103, at 448.

106 McEwen v. Canadian National Railways and Imperial Oil Limited (1961) 38 W.W.R. 76 (Alta. S.C.).

107 supra.

108 S.A. 1973, c. 79.

109 Schade, supra, n. 75, at 552.

110 Boryszko et al. v. Board of Education of City of Toronto and Bennett-Pratt Ltd. (1962) 35 D.L.R. (2d) 529 (Ont. C.A.).

111 Schade, supra, n. 75, at 554.

CHAPTER IV

STATUTORY DUTIES OF TEACHERS

The common law has set down many of the duties of teachers in general, and Physical Education teachers in particular.* Along with these common law duties are many statutory duties. These statutory duties will be outlined in this chapter in order that an understanding of them can be obtained before the common law duties are examined in following chapters. The regulations of the provinces and various school boards will not be examined here, nor will the duties of school boards be included.

The British North America Act[1] provides that education is one of the areas governed by the provinces. The act reads:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education.

Because of this the laws concerning education vary from province to province. In most cases, however, the sections

---

* See Chapters V and VI.

concerning teachers are similar.

1. The Statutory Definition of Teacher

Before a study of the duties of teachers can be undertaken, it is important to define what a teacher is. The provincial acts vary in their definitions of teacher. Some of these are:

The Teaching Profession Act, R.S.A. 1970, c. 362.

> 2. (j) "teacher" means a person holding a permanent or temporary certificate of qualification as a teacher issued by the Minister under The Department of Education Act.

The Education Act, R.S.N.S. 1967, c. 81.

> 1. (p) "teacher" means a person holding a teacher's certificate qualifying him to teach in the public schools in Nova Scotia, and includes a person heretofore or hereafter holding a teaching permit issued by the Council of Public Instruction or by the Minister.

Public Schools Act, R.S.B.C. 1960, c. 319.

> 2. (1) "teacher" means a person holding a valid and subsisting certificate of qualification issued by the Department of Education who is appointed or employed by a Board of School Trustees to give tuition or instruction or to administer or supervise instructional service in a public school, and includes a person to whom is issued, pursuant to this Act, a letter of permission for teaching, but does not include a person appointed by a Board as Superintendent of Schools or Assistant Superintendent of Schools.

Many provinces include student-teachers in their acts. An example of one such section is:

The Education Act, R.S.N.S. 1967, c. 81.

> 112. Every school board and every teacher employed by a school board shall admit to class rooms under the jurisdiction of the board students who are enrolled in the Nova Scotia Teachers College or in a teacher training course approved by the Minister in any university and the instructors of those students for the purpose of observation and teaching practice, and shall give them any assistance requested by the instructors.

As can be seen from the above sections, a teacher is any person who has been issued a certificate to teach by the Department of Education of the province. These definitions are very general and allow for the training of teachers for various levels of education and for various specialty fields.

2. Statutory Duties of Teachers

The duties of teachers, as set out in the various acts relating to schools, are general in nature. The duties of teachers most often included in these statutes are:

(1) to ". . . keep an accurate register of all the pupils enrolled in his class and keep an accurate record of the attendance . . ."[2] in the class.

(2) to teach the pupils in his class ". . . diligently and faithfully all the branches of learning required to be taught by him . . . ."[3]

(3) to ". . . conduct such tests and examinations as are

necessary to classify and grade pupils . . . ."[4]

(4) to ". . . maintain proper order and discipline in the school or room in his charge and dismiss from the school or room any pupil who is persistently defiant or disobedient."[5]

(5) ". . . to exercise vigilance over school property, the buildings, fences, furniture and apparatus . . ."[6] in order that they may not be unnecessarily injured, and to report such injury promptly to the school board.

(6) ". . . to report to the board any necessary repairs to the school building or furniture and any required supply of . . . furniture or equipment."[7]

(7) to ". . . give constant attention to the health and comfort of the pupils. . . ."[8]

(8) to ". . . report promptly to the Board the apparent outbreak of any infectious or contagious disease in the school, . . ."[9]

These provisions are general in nature and most are found in every province's statutes, with the exception of Alberta where The School Act[10] does not include a section on the duties of teachers.

These statutes set out general duties of teachers in relation to the pupils they teach. The common law can be used to interpret these duties, and can be used to determine if an action can be maintained against a teacher who

causes damage by a breach of a statutory duty. Usually, because of the very general nature of these duties, actions for damage are brought in negligence and are bases on case law.

FOOTNOTES

1 [1867] 30 and 31 Victoria, c. 3.

2 Public Schools Act, R.S.B.C. 1960, c. 319, s. 152 (a).

3 supra, s. 152 (b).

4 The Education Act, R.S.N.S. 1967, c. 81, s. 74 (e).

5 supra, s. 72 (b).

6 The Secondary Education Act, R.S.M. 1970, c. P250, s. 183 (9).

7 supra, s. 183 (10).

8 The Education Act, R.S.N.S. 1967, c. 81, s. 74 (h).

9 The Public School Act, R.S.B.C. 1960, c. 319, s. 152 (g)

10 R.S.A. 1970, c. 329.

CHAPTER V

LIABILITY FOR PHYSICAL EDUCATION CLASSROOM ACCIDENTS

In this chapter the law as it relates to Physical Education classroom accidents--accidents that occur during regularly scheduled class time--will be discussed. The location of the class is irrelevant for the purpose of this discussion. The fact that the class is held in a gymnasium, swimming pool, playing field or other sports or recreation site, located on or off school board property, is not a crucial issue. What is important, for the purposes of this discussion, is that the accident occurred during a regularly scheduled Physical Education class, taught by a teacher employed by the school board, within the scheduled hours for that class, to which attendance is compulsory for those enrolled in the course.

Further, only those situations that fall within the scope of the law of negligence will be considered. The law of negligence and the duties of teachers prescribed by statute and regulations have already been dealt with and hence will be alluded to only as required to clarify specific

points. On the other hand, the relationship between the board and the teacher, in regards to liability, and the defences available to an action in negligence, will be pursued in later chapters.

1. The Test for Teacher Liability

Teacher and school board liability is based on the law of negligence. In order to find a teacher, or school board, liable for negligence there must be a duty owed to the injured party; a breach of that duty; injury to the plaintiff; the damage must be caused by the defendant's act; the conduct of the defendant must be a proximate cause of the injury; and the plaintiff must not have voluntarily assumed the risk. Contributory negligence would reduce the liability. A test was devised in an early English case,[1] wherein a teenaged boy was burnt. A schoolmate took a bottle of phosphorus, which was left in a conservatory to which the boys has access, and where cricket equipment was kept. After the schoolmate put a match into it, the bottle exploded, burning the plaintiff. Lord Esher, in his judgement on this case, created the careful parent test, when he said:

> . . . as to the law on the subject there could be no doubt; and it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a

better definition of the duty of a schoolmaster.[2]

This test has been applied in many cases. An example is that of an English case in which a four year old boy, when left unattended momentarily, wandered out of the school and onto the street, causing the husband of the plaintiff to run his truck into a pole, while trying to avoid the child, and as a consequence, killed himself.[3] In this case Lord Goddard applied the careful parent test:

> Her [the teacher's] duty was that of a careful parent. I cannot think that it could be considered negligent in a mother to leave a child dressed ready to go out with her for a few moments and then, if she found another of her children hurt and in need of immediate attention, she could be blamed for giving it, without thinking that the child who was waiting to go out with her might wander off into the street . . . it seems to me that she acted just as one would expect her to do.[4]

This test was also considered in a Canadian case, Hall v. Thompson.[5] In this case, a nine year old boy fractured his arm when engaged in a wrestling contest, on soft ground, conducted by the teacher as a part of their physical training activities. The judgement stated, "The question then to be determined in this case is, would a careful father allow or direct his boy to take part in the wrestling contest . . . ?"[6] The teacher, and the school board, were held not liable since the activity was deemed to be one that was not dangerous to boys of that age, and

thus would be approved by a careful and reasonable parent.

In Moddejonge v. Huron County Board of Education et al.,[7] Pennell, J., in discussing the liability of a teacher, who was unable to swim, and who took a group of fifteen year old girls swimming in a creek, where two of them drowned, applied the test as follows:

> It seems to me, however, that a reasonably careful parent would have been unlikely to permit his daughter, who was unable to swim, to go into this particular body of water without exercising more care for her safety or ensuring that someone else did so on his behalf.[8]

Although the careful parent test is generally used, it has been questioned as to its applicability in modern schools. There are two reasons for a re-evaluation of the test: (1) the size of the classes has increased greatly in numbers of students; and, (2) teachers have a much more specialized knowledge of their particular subject area today, than that of a careful parent.

Heuston[9] has suggested that the careful parent test is no longer appropriate in circumstances such as a large class. He proposes that it would be simpler to change the duty of a teacher to be the duty ". . . to take such care as is reasonable in the circumstances."[10] A recent Canadian case, McKay v. Bd. of Govan School Unit No. 29,[11] considers the test in relation to the size of the class thus:

> . . . the duty of care . . . owed . . . was that which a careful father of a large family owes to his children . . . . While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that . . . in the improvised gymnasium is one to which Lord Esher's words do apply.[12]

The specialized knowledge of the teachers, extends to their knowledge of the children's abilities, as well as to their knowledge of the school building and equipment. The court may ask if the occurrence was one which the teacher or board ought to have anticipated,[13] since by using their special or "extra" knowledge, teachers would be able to foresee situations or risks, that a careful parent would not. In McKay,[14] where a boy severely injured himself when he fell from the parallel bars while practising for a gymnastic display, the Supreme Court of Canada discussed the test when it examined the ruling of the Saskatchewan Court of Appeal. Ritchie, J. considered it as follows:

> Mr. Justice Woods, however, in the course of the reasons for judgement which he delivered on behalf of the majority of the Court of Appeal, expressed the view that while the test of the "careful father" is readily applicable to students taking part in team games such as hockey or baseball, it did not apply to the facts of this case and he continued by saying [62 D.L.R. (2d) at p. 512]:
>
> > A physical training instructor in directing or supervising an evolution or exercise is bound to exercise the skill and competence of an

> ordinarily competent instructor in the field. The standard of the careful parent does not fit a responsibility which demands special training and expertise.

The learned Judge later said:

> The standard of the person possessed of special training or expertise may well be higher than that of the careful parent and it may well be that on applying it to the present facts a jury might arrive at the same result.[15]

In reversing the findings of the Court of Appeal, the Supreme Court of Canada applied the more common careful parent test, when Ritchie, J. said:

> I take the view that a reasonably careful parent would have been unlikely to permit his boy, almost totally inexperienced in gymnastics, to execute the manoeuver which young McKay performed without exercising a great deal more care for his safety or ensuring that someone else did so on his behalf.[16]

The Supreme Court of Canada did not think that it was necessary to develop a higher test, such as the duty owed by a "physical training instructor," since it was possible to determine liability by using the lower "careful parent" test. If a careful parent would be able to foresee the risk and danger involved in this activity, it was felt that it was not necessary to rely on the specialized knowledge of the Physical Education teacher, thus the careful parent test was retained.

In a case recently argued in the British Columbia Supreme Court,[17] counsel for the plaintiff, a sixteen year

old boy who was injured during a Physical Education class, asked the court to consider the adoption of a new test, the "careful peer test," to replace the careful parent test. It was argued that a Physical Education teacher's specialized knowledge of children and physical activities would enable him to better foresee risks involved in an activity. Thus each Physical Education teacher should be held to the standard of his or her "peers" and be expected to act as a careful and competent Physical Education teacher. This test may be adopted some time in the future, but at present, a teacher must act like a careful parent.

2. The Duty of Physical Education Teachers

The duty owed by a person, or class of persons, is probably the most essential element to be defined when negligence is being resolved. The duty is the first fact to be established, as is shown by the following judgement:

> Before the liability of the defendants to [the plaintiff] can be established, three things have to be proved:
> (1) that the defendant owed to the deceased . . . a duty "to take care of her" in the proper sense of that term;
> (2) that the defendants failed to take such care; and
> (3) that the defendants' failure was the "cause" of her death.[18]

If it is found that there was no duty owed to the person complaining of injury, then there can be no further inquiru as to negligence, since there can not be a breach of a non-

existent duty.

This section will examine the case law to ascertain the duties of Canadian Physical Education teachers towards pupils in their classes. There appears to be three general categories into which the teachers' duty falls--instruction, supervision, and provision of safety measures. Although these duties are virtually inseparable in the classroom activities of the teacher, each will be examined separately here.

Instruction

All Canadian provinces require that teachers be qualified as a teacher before they may be hired by a school board to teach.[19] The qualifications set out by the provincial statutes usually require a teacher to hold a teaching certificate which is issued by the province; for example the Alberta act states:

> A board shall employ as a teacher only a person who holds a certificate of qualification as a teacher issued under The Department of Education Act.[20]

Some provinces also make provisions for student teachers.[21]

These statutes do not demand that Physical Education teachers, or teachers in other specialty fields, receive special or more detailed training in their area. There are cases, however, which imply that persons who are giving instruction in Physical Education should have some "special

knowledge" in the subject. The jury in the trial of McKay,[22] when asked to state the acts or omissions which constituted the failure in the duty of care by the teacher, answered in part, that the instructor was not sufficiently qualified. The teacher ". . . had had some experience in gymnastics while at teachers' college but was not a qualified instructor in gymnastic work on the parallel bars."[23] This case, though, does not specify what training or education was required in order that the teacher would be qualified to instruct work in gymnastics, or on the parallel bars. The Court of Appeal, however, held that a Physical Education teacher should exercise the skill and competence of an ordinarily competent instructor in the field. In another case, a teacher who had a master's degree in outdoor education but who was unable to swim, was found liable when two teen-aged girls drowned when he took a group swimming.[24] Here also, the court found the teacher liable, when the careful parent test was applied. It was held that a reasonably careful parent would have exercised more care for the children's safety. The teacher knew that he could not swim, thus he knew that he was not qualified to take the girls swimming, and he also knew there was no life-saving equipment available. A careful parent would have provided more care than this.

The teacher, along with being qualified, has a duty

to choose activities that are suited to the age, and ability of the children in the class. A teacher was held to be not liable for negligence when a twelve year old student broke a wrist while breaking up a pyramid in gymnastics, since the court found that the activity ". . . was one suitable to the age, mental alertness and physical condition of the infant plaintiff."[25] Handicapped children are owed a stricter duty of care than is owed to non-handicapped children.[26]

The method of instruction has also been examined by the courts. It has been held that there must be sufficient demonstration of the activity, before the student should be required to attempt it. The jury in McKay[27] found that there was insufficient demonstration on the parallel bars by the teacher, and held that this had contributed to the accident.

On the other hand, if there is no actual demonstration, sufficient instruction must be given as to how the activity is to be performed. A teacher was held not liable for injuries when the court found:

> . . . as facts, that the defendant's instructor did properly and adequately instruct the infant plaintiff as to how to act and conduct himself, both in the action of forming the pyramid and in the breaking of the pyramid.[28]

A similar judgement was given in Hall v. Thompson,[29] when

a teacher was held not liable when he gave no instruction as to holds, but did give instruction as to the rules in a wrestling match, in which a boy was injured.

Cases which involve the learning of physical skills, but do not involve school teachers, may be of some assistance in determining the instruction required in schools, because of circumstances which are parallel to those in Physical Education classes. The duty of parents to instruct their children in the use of dangerous weapons,[30] and how to care for their own safety,[31] has been discussed in many cases. Starr and McNulty v. Crone,[32] in which a fifteen year old boy shot another boy, held that:

> . . . it is negligent to entrust a dangerous weapon to a young boy unless it is proved: (a) That he was properly and thoroughly trained in the use of the weapon, with particular regard to using it safely and carefully; (b) That the boy was of an age, character and intelligence so that the father might safely assume the boy would apprehend and obey the instructions given him.[33]

A case in which an experienced driver was teaching a sixteen year old boy to drive a car also discussed the instruction required, when the court said:

> I think the instructor was negligent. In telling the learner to slow down he did not tell him to apply the brake. He himself says that he was not sure the learner had heard him. This doubt, combined with his knowledge that the learner had not applied the break, should have warned him of the instant peril . . . . the instructor must be held to know that the driver did not possess full skill and to

> have accepted the consequent risk . . . . And the learner's skill and competence, as known to the instructor, will improve as the lessons progress and to the degree they have improved the instructor's acceptance of risk will diminish.[34]

From these non-school cases, it appears that the duty to instruct pupils fully includes the duty to give complete directions as to how to perform the skill or act, as well as directions as to how to perform the activity safely. In addition, the instructor must take into consideration the skill level at which the student is presently competent, and to adjust the instruction so as to be fully comprehended by children of that particular skill level.

A further duty required, is the duty to give instruction in progressive steps. The student must be taught the basics of an activity first, and then be instructed in such a manner that gradually more complex or difficult aspects of the skill are acquired in their proper order, as the student is capable of performing them. A teacher has been held liable for an injury which occurred when a student performed a dangerous activity for the first time, and without previous experience with the specific equipment.[35] Another case, on the other hand, found a teacher not liable for the injury of a pupil suffered in an activity for which he had been trained, and held:

> . . . that there is an element of danger in all sports and even in the less dangerous ones, but at

> the same time that element of danger can be reduced to a minimum when the participants observe the rules of the game, play with reasonable prudence and care after having, in the proper cases, been progressively trained and coached in such exercises.[36]

In McKay[37] the plaintiff had never done any work on the parallel bars before the few days prior to his accident. Ritchie, J. in his judgement, said:

> I take the view that a reasonably careful parent would have been unlikely to permit his boy, almost totally inexperienced in gymnastics, to execute the manoeuver which young McKay performed without exercising a great deal more care for his safety. . .[3]

Clearly, one form which this "great deal more care" could take would be the teaching of the skill by means of progressive steps.

Finally, the teacher has the duty to give the students sufficient time to learn each step of the skill or activity. The jury in the McKay trial found that the teacher failed in his duty of care partly because the progressive steps on the parallel bars were rushed.[39]

The teacher, therefore, has the duty to be qualified to instruct; to choose activities suited to the children's age and ability; to give sufficient instruction as to how to perform the skill and how to do it safely; to give instructions in progressive steps; and, to allow sufficient time to learn each step. In each case what will be deemed as sufficient will depend on the facts of the particular

circumstances.

Supervision

The second general category of duties owed by teachers to students is supervision. The duty to supervise overlaps, and indeed is an integral part of, the duty to instruct. It would be almost impossible for a teacher to instruct a child to perform an activity without at the same time supervising the student's initial attempts to perform it. The duty of supervision will, therefore, be discussed more in relation to the teacher's supervision of students who are practicing skills, playing games, or doing other activities that do not involve direct instruction by the teacher.

The question of supervision was dealt with during an English case, in which a small child wandered out into the street and caused a traffic accident. The problem of the amount of supervision required for small children, was expressed by Lord Oakley:

> I think, therefore, that the case ought to stand or fall upon the issue of [the teacher's] conduct, and, in my opinion, it cannot be decided in favour of the [plaintiff] without inferentially holding that education authorities are bound to keep children under constant supervision throughout every moment of their attendance at school, which, in my opinion, is to demand a higher standard of care than the ordinary prudent schoolmaster or mistress observes.[40]

The duty therefore, is not to provide constant supervision, but more likely, to provide reasonable supervision. What

is reasonable depends on the particular circumstances of each case.

The teacher has a duty to supervise in close proximity to the children. In Moddejonge v. Huron County Board of Education,[41] the teacher was held liable for two drownings, partly because he was not in close proximity to the girls who were swimming in a creek. The court found that the teacher had moved away from the girls when they were near a drop-off point in the water. Another case held a teacher liable for not staying close to the student who was using the most dangerous piece of equipment in an industrial arts shop. Laskin, J. thought that the teacher should have stayed near the boy, and he said:

> . . . he could have stayed with the plaintiff until the job was done with the unguarded saw. There were only twelve edges to trim and the other students were working with hand tools. I do not find it improbable that the accident would not have happened if the instructor had directly supervised the operation until they were finished.[42]

The duty of a teacher is to supervise the children during the instruction period. This supervision need only be reasonable, and need not be a constant guarding of every student's every moment. The supervision though, must be in close proximity to the students, especially those who are doing the most dangerous activity.

Provision of Safety Measures

It has been held ". . . that there is an element of danger in all sports and even in the less dangerous ones,"[43] and, ". . . there is hardly any physical exercise which you can take in which an accident may not happen."[44] The extent of the duty to take care has been discussed in many cases. An English court, in dismissing an action in negligence for an injury suffered by a seventeen year old boy in a game, said:

> It has been stressed on behalf of the [plaintiff] that the game had been played on a wooden floor and that there was no matting. If there had been matting it would have been said that there ought to have been a mattress; and if there had been a mattress it would have been said that there ought to have been a feather-bed; and if there had been a feather-bed; that the boys ought to have been wrapped up in cotton-wool or rubber . . . . Even if it is assumed that the game was in which one or more of the competitors was likely to fall, that would not be sufficient to establish a case of negligence; otherwise it might be said that no instruction in physical exercise or games could even be given in a school without the authorities being liable if a boy fell and happened to hurt himself . . . .[45]

The Canadian courts have also given much consideration to this question of how much safety precaution should be taken by teachers. These cases discuss many aspects of the safety precautions required, and set out the duty of teachers in this respect.

Teachers are ". . . under a duty to take into account

and to anticipate the known propensities and tendencies of children . . . ."[46] Williams v. Eady held that the teacher ". . . was bound to take notice of mischievous acts, and [the boys] propensity to meddle with anything that came in their way."[47] In Carmarthenshire County Council v. Lewis,[48] the teacher was found not liable of negligence when she left two well behaved children alone, while she had to attend another child, since she ". . . would never have thought that the children would wander out of the school into the yard . . . ."[49] A Canadian case, Butterworth v. Collegiate Institute Board of Ottawa,[50] in which a fourteen year old boy, who knew he was clumsy and knowing there was no one to assist him, was hurt when he attempted to vault a horse. The court found the teacher not liable, even though he was not present at the accident. The boy was found to be totally at fault in causing his own injuries. In regards to the duty of the teacher, the court held:

> . . . it was the duty of the defendant to anticipate that boys using a gymnasium equipped with gymnastic apparatus would have a tendency to use that apparatus, and also that it may very well be that it was the duty of the defendant to recognize that the use of gymnastic apparatus, such as a vaulting horse, involves the risk of injury . . . .[51]

Thus the teacher has the duty to know the propensity of children to play with inviting pieces of apparatus, and to disobey on occasions. This duty also applies to parents

as is shown by the judgement in Starr and McNulty v. Crone,[52] where:

> . . . the father had . . . by restricting the use by the boy of the weapon, shown that he did not think the boy fully capable of using it with care under all circumstances; and that, having such knowledge, and knowing the propensities of boys, it was negligent to leave the gun where the boy might get it and use it in disobedience to instructions.[53]

In this case the boy shot another child and the father was found to be liable. The parent, or teacher, having the knowledge of the child's propensity, would likewise be liable if the child himself had been injured.

The teacher must know the propensity of children of a certain age and sex group, and at times, must know the propensity of a particular child.*

The teacher also must be able to anticipate the risk involved in an activity. The risk of injury might eventuate by reason of the age, strength or skill level of the children; the circumstances surrounding the activity; or the nature of the equipment. In Butterworth, the court recognized that the use of gymnastic equipment involved the risk of injury. Both the teacher and the student were expected to appreciate the risk in that case. In Moddejonge, a case in which two girls drowned while swimming in a creek, the court held that the teacher should have anticipated the

---

* see p. 63 for a more complete discussion.

risk since he knew the bottom of the creek had a sharp drop-off, that he could not swim, that there was no life-saving equipment available, that some of the girls were non-swimmers, and that a fresh breeze had sprung up over the water. The teacher was found to be liable in negligence for not taking steps to counteract this risk. A test that has been applied to determine if the teacher should have anticipated the risk in a child's play was set out in the following way:

> Was the occurrence one which the school master or educational authority ought to have anticipated? Was it something reasonably foreseeable, and consequently something which the defendant or its servants ought to have guarded against.[54]

Physical Education teachers, because of their specialized training should be able to anticipate, or foresee, risks that may occur in their classes, and have the duty to do so.

Once the risk is recognized by the teacher, the duty to keep it away from the students arises. Teachers thus, have the duty to keep dangerous "things" away from the students. This was set out in the English case, Williams v. Eady:[55]

> Then, having phosphorus in his house, he was bound not to leave it in any place in which [the students] might get at it, and so if he left it in the conservatory he did not use due care, but otherwise if he kept it locked up. If, therefore, the defendant

> kept the bottle locked up there would be no evidence of negligence. But if the bottle was left in the conservatory for any time before the accident then there was evidence on which the jury might find negligence and a want of proper care for the safety of the boys.[56]

While the school board has a statutory duty to keep equipment in repair, the teacher also has the duty to provide safe equipment and to make certain that it is fit for the purpose for which it is being used. A test was set out in a case in which a boy cut his hand on a saw in an industrial arts shop examination:

> The test of fitness is not that others use like tools and machinery but to consider whether they are reasonably safe and suitable for the work to be done, and such as a reasonably careful man would use under like circumstances. "Reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable and employers are not insurers. They are liable for the consequences, not the danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business.[57]

Physical Education teachers, because of their specialized training should know the ordinary usage of the equipment normally found in gymnasiums, pools and playing fields. They would, therefore, know, or be able to ascertain, when equipment was not suited for the activity planned, and thus they have the duty to do this.

Teachers also have the duty to provide adequate and competent spotters, when necessary. The teacher in McKay[58]

was found to be liable for the injury of the plaintiff partly because there was insufficient care and attention to spotting. The teacher and one of the other students were acting as spotters at the time of the accident, but ". . . neither of them was at any time in a position to assist McKay in what he was doing or to prevent a fall in the area where it took place."[59] When a student acts as a spotter no legal liability is assumed, as long as the student does not perform the duties negligently. In a medical case which considered the liability of hospital employees, Denning, L.J. said:

> I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else . . . .[60]

It may be assumed that a teacher does not delegate legal responsibility to a spotter, or a student who is supervising,[61] since there was no mention of any such liability in McKay.

To avoid a risk of harm the teacher has the duty to have the child participate only in activities that are suitable. This has been set out in the headnote of Murray v. Board of Education of the City of Belleville[62] as:

> It is not negligent to permit a pupil to take part in an exercise in which there is an element of danger if he has been progressively trained and coached to avoid such danger and the exercise is one reasonably suitable to his age and condition, physical and mental.[63]

In order to perform this duty the teacher must know the demands of each activity and the capabilities of the children.

The teacher therefore, has the duty to provide safety measures for the students. This duty includes the duty: to anticipate the propensities of children; to keep dangerous "things" away from the children; to provide safe equipment; to provide spotters when necessary; and, to allow only those activities which the children are at the skill level at which they are capable of performing.

Summary of the Duties

Instruction

Physical Education teachers have the duty:

(1) to be qualified to instruct the activities included in the class;

(2) to choose activities which are suited to the children's age and ability;

(3) to give sufficient demonstration of the skills involved in each activity;

(4) to give instruction in progressive steps;

(5) to give sufficient instruction as to how to perform the skills and how to perform them safely; and,

(6) to allow sufficient time to learn each of the progressive steps.

Supervision

Physical Education teachers have the duty:

(1) to supervise the children in the classroom, gymnasium, pool or playing field;

(2) to supervise a reasonable amount of the time; and,

(3) to be in close proximity to the students, especially those who are doing the most dangerous activity.

Provision of Safety Measures

Physical Education teachers have the duty:

(1) to anticipate the propensities of children, and to anticipate the known propensities of particular children;

(2) to anticipate the risks involved in Physical Education activities;

(3) to keep dangerous "things" away from children;

(4) to provide safe equipment;

(5) to provide spotters, when necessary; and,

(6) to allow only those activities which the children are capable of performing.

FOOTNOTES

1 Williams v. Eady (1893) 10 T.L.R. 41 (C.A.).

2 supra, at 42.

3 Carmarthenshire County Council v. Lewis [1955] A.C. 550 (H.L.).

4 supra, at 561-62.

5 [1952] 4 D.L.R. 139 (Ont. C.A.).

6 supra, at 140.

7 [1972] 2 O.R. 437 (Ont. H.Ct.).

8 supra, at 443.

9 Heuston, R.F.V., Salmond on the Law of Torts, sixteenth edition, Sweet & Maxwell, London: 1973.

10 supra, at 232-33.

11 (1968) 68 D.L.R. (2d) 519 (S.C.C.).

12 supra, at 523.

13 Durham et al. v. Public School Board of Township School Area of North Oxford (1960) 23 D.L.R. (2d) 711 (Ont. C.A.).

14 supra.

15 supra, at 523.

16 supra, at 523.

17 Thornton et al. v. Board of School Trustees of School District No. 57 undecided case, June, 1974 (B.C.S.C.).

18 Moddejonge, supra, n. 7.

19 The School Act, R.S.A. 1970, c. 329, s. 73.

20 supra, s. 73.

21 supra, s. 72.

22 McKay, supra, n. 11.

23 supra, at 521.

24 Moddejonge, supra, n. 7.

25 Murray et al. v. Board of Education of the City of Belleville [1943] 1 D.L.R. 494 (Ont. H.Ct.), at 495.

26 Dziwenka et al. v. The Queen in right of Alberta et al. (1972) 25 D.L.R. (3d) 12 (S.C.C.).

27 supra.

28 Murray, supra, n. 25, at 495.

29 [1952] 4 D.L.R. 139 (Ont. C.A.).

30 Hatfield v. Pearson [1956] 17 W.W.R. 575 (B.C.S.C.).

31 Sample et al. v. Klassen (1970) 72 W.W.R. 284 (Man.Q.B.).

32 [1950] 2 W.W.R. 560 (B.C.S.C.).

33 supra, at 565-66.

34 Lovelace v. Fossum et al. (1972) 24 D.L.R. 561 (B.C.S.C.), at 566.

35 Dziwenka, supra, n. 26.

36 Murray, supra, n. 25, at 496.

37 supra.

38 supra, at 523.

39 Murray, supra, n. 25.

40 Carmarthenshire County Council, supra, n. 3, at 559.

41 supra.

42 Dziwenka, supra, n. 26.

43 Murray, supra, n. 25, at 496.

44 Jones v. London County Council (1932) 96 J.P. 371 (C.A.) at 374.

45 Barrell, G.R., Legal Cases for Teachers, Methuen & Co. Ltd., London: 1970, at 278.

46 Durham, supra, n. 13.

47 Williams, supra, n. 1, at 42.

48 Carmarthenshire County Council, supra, n. 3.

49 supra, at 559.

50 [1940] 3 D.L.R. 466 (Ont. S.C.).

51 supra, at 472.

52 Starr, supra, n. 32.

53 supra, at 563.

54 Durham, supra, n. 13, at 719-20.

55 Williams, supra, n. 1.

56 supra, at 42.

57 Smiles v. Edmonton School District (1918) 43 D.L.R. 171 (Alta. S.C.).

58 McKay, supra, n. 22.

59 supra, at 521.

60 Cassidy v. Ministry of Health [1951] 1 All E.R. 574, at 586.

61 Butterworth et al. v. Collegiate Institute Board of Ottawa [1940] 3 D.L.R. 466 (Ont. S.C.).

62 Murray, supra, n. 25.

63 supra, at 494.

CHAPTER VI

LIABILITY FOR ACCIDENTS DURING EXTRACURRICULAR ACTIVITIES AND TRAVELLING

Teachers have duties towards students during times other than regular class times. These times include: before school, at recess and at lunch time while the students are on school property; during authorized school activities outside of class time, whether on or off of school property; and, to some extent, during travelling to and from authorized activities. Generally, the activities participated in on the school grounds are games, sports and play of some nature. Many approved activities and school approved trips also involve sporting events. The cases in this chapter usually refer to such activities, but the rules described herein would apply to all nature of approved and informal activities which occur outside of class time. The case law which sets out the duties of teachers during these times will be examined in this chapter.

1. Liability for Playground Accidents

Since students are classed as invitees when they are on school property, teachers have a duty to protect them from accidental injuries during their free play periods. This duty can be divided into four categories, namely: to anticipate dangers on the grounds; to warn the students of these dangers; to supervise, and; to know the propensities of the students.

Duty to Anticipate Dangers on the School Grounds

Teachers have a duty to anticipate dangers that may exist on the school grounds. These dangers may exist as physical objects on the grounds, or they may be inherent in the activities of the children.

A teacher has the duty to foresee dangers that exist in games the children are playing. In Gard v. Board of School Trustees of Duncan,[1] Robertson, J.A. said: "The duty should not be determined from the happening of the extraordinary accident in this case, but from the danger that was reasonably foreseeable before the game."[2] In this case a teacher allowed eleven year old boys to play an unsupervised game of grass hockey. The decision held:

> While, . . . danger may eventuate in any game, and in that sense injury to one of the players might be foreseen, yet that danger is one of the risks of the game . . . the chances of any risk

> eventuating in a game of grass hockey played by children would be very slight. The possibility of danger emerging was only a mere possibility which would never occur to the mind of a reasonable man; and therefore there was no negligence.[3]

While teachers are required to foresee any real risk in an activity, such as a game, they are not required to foresee all dangerous acts children may perform. In Boryszko et al. v. Board of Education of City of Toronto and Bennett-Pratt Ltd.,[4] an eight year old boy was injured when he played near a pile of construction blocks on the school ground, contrary to instructions by the school authorities. Another boy playing on the pile of blocks caused one to fall onto the plaintiff's foot, causing the injury. Schroeder, J.A. said in regards to this duty:

> We are not prepared to say that the defendants ought reasonably to have foreseen this occurrence. There is no evidence that such conduct had occurred previously.[5]

Teachers are required to foresee when objects, or conditions, on the school grounds would present a risk to the children. Some objects which were held to be not foreseeable as a danger, or not to be a danger were: a piece of wire which "flew" into a child's eye when he was playing with it;[6] a high-jump bar with a broken end which was knocked into a spectator's eye;[7] and, an uncleared bush which had trees with thorns on their branches which blinded two boys playing tag.[8] It is difficult to determine what

articles are inherently dangerous and those potentially dangerous. In order to determine if a teacher has fulfilled his duty in regards to anticipating a danger it may be advisable to consider the words of C.J. Ford, J.A.:

> . . . in order to test the standard of duty it is necessary to consider whether there is something which the school master ought to have anticipated, something reasonably foreseeable, and something, therefore, which, because of its foreseeability, the master ought to have guarded against.[9]

In order to avoid liability when there is an activity, or object or condition, which constitutes a real danger to the pupils, the teacher must foresee the danger and take reasonable measures to prevent the risk eventuating into harm.

Duty to Warn Students of Dangers

One reasonable measure that could be taken to prevent a risk of harm from occurring, is to warn the students of the danger. Some courts have found that the student contributed to his own harm when he ignored a warning by the teacher to stay away from a danger.[10] It has also been held that a teacher has no duty to warn a student of a very obvious danger such as the exposed ends of knitting-needles.[11] In Schade v. Winnipeg School District No. 1 and Ducharme,[12] a fourteen year old boy tripped over a construction marker stake while playing a game of scrub baseball on the school

grounds. The boy had been repeatedly warned to keep away from the area of construction. The court found that the boy was liable for his own injuries by ignoring the warning and not taking sufficient care of himself. The court also held that ". . . there was no duty cast on either defendant to put up warning signs."[13] It appears therefore that the duty to give warnings as to danger need only be verbal warnings.

Duty to Supervise

Teachers have a duty to supervise the students who are on the school grounds. Ritchie, J. said, in Board of Education for City of Toronto and Hunt v. Higgs et al.:[14]

> The duty of supervision which a school authority owes to its pupils while they are at play must of necessity vary from school to school and even from day to day, and it is, therefore, not possible to elicit from the decided cases any guiding principle for the exact measurement of the degree of care to which any particular set of circumstances may give rise.[15]

In this case a fifteen year old boy was injured by another pupil, who was known to indulge in rough play, while he was talking to some girls on the school grounds. Four teachers were on supervisory duty in the school yard at the time of the accident, but none of them saw it happen. Ritchie, J. went on to say:

> . . . it seems to me that the analogy between the duty of a school master to his pupils and that of

> a parent to his children, while it applies with some force to the duty which the individual master owes to children under his care, cannot be related with the same validity to the responsibilities of organization and administration which rests on . . . [a] principal of a school with an enrolment of 750 pupils . . . it is, therefore, a question of what standard of organization the law requires of a school authority under such circumstances which must be determined.[16]

The court held that there was adequate supervision on the school grounds since of the 750 students present only two saw part of the accident. It was held that the presence of extra teachers as supervisors probably would not have affected the conduct of the boys and prevented the accident.

Other cases support this view. It was held that the presence of more than four teachers in the school yard would not have prevented a boy from being git in the eye by an acorn thrown by a playmate.[17] Likewise, supervision would not have prevented an accident to a girl tobogganing on the school yard before classes began in the morning;[18] nor would supervision of a scrub baseball game,[19] or a pick-up game of grass hockey[20] have prevented the injuries which occurred.

The duty of supervision of playgrounds appears to depend on the circumstances of each case. Generally, only reasonable supervision is required.

Duty to Know Propensities of Children

Teachers must know the propensities of children when they are on the playground, as well as when they are in class. They must be aware of the general propensities of children of an age group and should know such things as: eleven year old boys may throw hard objects at one another;[21] and that ten year old boys may play carelessly with objects which they find lying about.[22] They should also know the propensities of certain individual students to engage in rough play.[23] This knowledge can allow teachers to foresee dangerous occurrances that may arise, and thus allow them to employ measures to protect students against them.

2. Liability for Authorized Activities

There is a noticible lack of cases dealing with injuries which occurred during authorized extracurricular physical education activities. This may exist for one of three reasons: (1) very few serious accidents happen at such activities; (2) accidents which do occur are of such a minor nature that no civil action is commenced, or (3) the actions which are commenced are settled out of court. There is not enough information available to speculate as to which of these, if any, is the reason for this lack of reported cases.

Three cases, in which accidents occurred during

approved physical education activities, found the teacher or school board liable for the injuries sustained by the pupils. In Moddejonge et al. v. Huron County Board of Education et al.,[24] the school approved an outdoor education programme, which was conducted on the property of the conservation authority, but was conducted and instructed by two teachers employed by the school board. They were held liable for the deaths of two girls who drowned while swimming because of the negligence of the teacher.

In Walton v. Vancouver Board of School Trustees,[25] a twelve year old boy was injured in a school approved shooting competition held on a sports day holiday. The rifle which was used by the boy was defective, and the teacher did not examine it to see if it was safe to use. Macdonald, C.J.A., when he found the teacher liable for negligence, said:

> . . . it is enough to say that if they [the board] do authorize or permit such a practice, the duty to supervise it properly must be held to rest upon them and a breach of that duty will subject them to damages.[26]

In McKay et al. v. Board of Govan School Unit No. 29 of Saskatchewan et al.,[27] it was held that the teacher's negligence was the cause of the injury to the pupil. In this case the teacher was holding a practice session for a gymnastic display which was to be held at the school. The

Supreme Court of Canada found the teacher liable for negligence because: he was not qualified to instruct gymnastics; he did not demonstrate the skill being performed; he gave insufficient care and attention to spotting; and there were not sufficient safety precautions available. This case appears to demand the same standard of care from teachers at approved activities, as is required from teachers in class room situations.

3. Liability for Travelling Accidents

There is very little law, in Canada, in relation to accidents which occurred on school trips. Such school trips are sometimes provided for by statute, such as in Alberta where The School Act[28] states:

> 138. Notwithstanding anything in this Part a board may
> (c) arrange for, undertake or sponsor, for its pupils and at its own cost or otherwise, educational, cultural or recreational trips inside or outside its district or division.

Generally, the duty of teachers and school boards towards the students depends on the relationship between the driver of the vehicle transporting the pupils and the school board. If a person is a bus driver, or possibly a taxi driver, who is employed by a company which contracts with the school board to provide transportation, that person is called an independent contractor. The driver

takes instructions from the bus, or taxi, company, and is therefore an employee of that company and not an employee of the school board. Instructions from the school board to the driver, to "drive carefully" and where to take the students do not make a driver an employee, or servant, of the board.[29] If the independent contractor is negligent, an action must be taken against him and the company that employs him, not the board. If it is a teacher who is driving the students, he owes them the normal duty of care owed by all drivers to their passengers. If he is driving students in the course of his employment he probably will be protected from personal liability by the doctrine of vicarious liability. However, if a teacher is conducting an unauthorized trip, he may be personally liable for any injuries which occur.[30]

The duty owed by a driver to his passengers was set out in Nichiporik v. Kostiuk,[31] when Greschuk, J. said:

> . . . to succeed . . . the plaintiff must prove that the accident was caused by the gross negligence or wilful and wanton misconduct of the defendant, and that the gross negligence or wilful and wanton misconduct contributed to the injury or loss suffered by the plaintiff in the accident.
>
> The test for determining whether or not a driver has been guilty of gross negligence or wilful and wanton misconduct is outlined by Duff, J. in McCulloch v. Murray [1942] SCR 141, . . . where he said at p. 145:
>
> ". . . All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply

> conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which reasonable and competent people in charge of motor cars habitually govern themselves."[32]

In regards to school cases, if an independent contractor has been hired, there may be no duty of care required from the teacher in regards to travelling to an approved event. In one case a fourteen year old girl, while hurrying to get her equipment and return to meet the volleyball team who was waiting in taxis in front of the school, ran through a glass panel in the entrance of the school, thinking it was an open doorway.[33] In regards to the liability of the teacher, MacDonald, J. said:

> The infant plaintiff, while she was in process of going to play volley ball on a school team under the supervision of [the teacher], cannot be said to be under the supervision as to the manner in which she stepped through the glass panel . . . . The teacher in charge . . . did not have any duty towards [the student] in this regard.[34]

The teacher then, had no duty to see that the student entered the vehicle properly, and has no duty when the vehicle is driven by an independent contractor.

FOOTNOTES

1 [1946] 2 D.L.R. 441 (B.C.C.A.).

2 supra, at 456.

3 supra, at 459.

4 (1962) 35 D.L.R. (2d) 529 (Ont. C.A.).

5 supra, at 531.

6 Durham et al. v. Public School Board of Township School Area of North Oxford (1960) 23 D.L.R. (2d) 711 (Ont. C.A.).

7 Edmondson v. Board of Trustees for the Moose Jaw School District No. 1 (1920) 55 D.L.R. 563 (Sask. C.A.).

8 Portelance et al. v. Board of Trustees of Roman Catholic Separate School for School Section No. 5 in Township of Grantham (1962) 32 D.L.R. (2d) 337 (Ont. C.A.).

9 Brost and Brost v. Tilley School District et al. (1955) 15 W.W.R. (N.S.) 241 (Alta. S.C.).

10 Edmondson, supra, n. 7; Boryszko, supra, n. 4; Portelance, supra, n. 8.

11 Murdoch MacDonald v. The County Council of the County of Inverness [1937] S.C. 69 (Court of Session)

12 (1958) 27 W.W.R. 546 (Man. Q.B.).

13 supra, at 566.

14 (1960) 22 D.L.R. (2d) 49 (S.C.C.).

15 supra, at 55.

16 supra, at 55.

17 Dyer (Otherwise Venables) et al. v. Board of School Commissioners of Halifax [1956] 2 D.L.R. (2d) 394 (N.S.S.C.).

18 Scoffield et al. v. Public School Board of Section No. 20, North York [1942] O.W.N. 458 (Ont. C.A.).

19 Schade, supra, n. 12.

20 Gard, supra, n. 1.

21 Dyer, supra, n. 17.

22 Durham, supra, n. 6.

23 Bd. of Education for Toronto, supra, n. 14.

24 [1972] 2 O.R. 437 (Ont. H. Ct.).

25 [1924] 2 W.W.R. 49 (B.C.C.A.).

26 supra, at 51.

27 (1968) 68 D.L.R. (2d) 519 (S.C.C.).

28 R.S.A. 1970, c. 329.

29 Baldwin et al., McKinney et al., McLaren et al. v. Lyons and Erie District High School Board (1961) 29 D.L.R. (2d) 290 affirmed (1963) 36 D.L.R. (2d) 244 (S.C.C.).

30 Beauparlant et al. v. Board of Trustees of Separate School Section No. 1 of Appleby et al. [1955] 4 D.L.R. 558 (Ont. H.Ct.).

31 [1970] 75 W.W.R. 131 (Alta. S.C.).

32 supra, at 135.

33 Sombach et al. v. Trustees of Regina Roman Catholic Separate High School District of Saskatchewan (1970) 72 W.W.R. 92 (Sask. Q.B.).

34 supra, at 96.

CHAPTER VII

VICARIOUS LIABILITY--THE TEACHER AND THE SCHOOL BOARD

The teacher, in many respects, is an intermediary between the school board and the pupil.[1] It is the board that determines the curriculum and hires the teachers to carry out the program of instruction for the pupils. In most cases the teachers are merely to ". . . maintain proper order and discipline and to conduct and manage the school in accordance with the regulations of the department."[2] The teacher is, therefore, an employee of the school board. This relationship of employer and employee is vital to the question of vicarious liability.

1. The Basis of Vicarious Liability

Vicarious liability is an instance of strict liability since it occurs when the law ". . . holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault."[3] In essence, vicarious liability imposes liability on a person who is not directly at fault for the harm done.[4] It is imposed

only when there is a special relationship between the actors and the acts. There must be three connective links, namely:

(1) there must be a tortious act or omission by another,

(2) there must be some relationship between the actual tortfeasor and the defendant whom it is sought to make liable, and

(3) there must be some connection between the tortious act or omission and the relationship in section (2).[5]

There are two vital relationships here. The relationship between the actual tortfeasor and the potential defendant--the "employment relationship"--and the relationship between the tortious act or omission and the employment relationship--the "scope of employment relationship." In a discussion of the vicarious liability of teachers, both the employment relationship and the scope of employment relationship are determined by statutes[6] and by case law.[7]

The Control Test

In order to determine when this employment relationship exists a test was developed which said that if one person had "control" over another, the employment, or master and servant, relationship existed. The control test was set out by Lord Porter, when he said that the employer must:

> . . . control the method of performing [the act]. It is true that in most cases no orders as to how a job should be done are given or required: the

> man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.[8]

The control test thus stated that the master is liable if he is entitled to tell the servant how to do the job. It has been suggested that this test is no longer effective since present day skilled technicians often have a greater knowledge of their job than the employer does, thus the employer cannot tell the skilled employees how to do their job.[9] It has been suggested that what is important now is who selected the servant to do the job--the employer or the injured party.[10] This has been supported in a hospital case where professionals were employed by the hospital to care for a patient who was then injured by their negligence. The House of Lords held that the hospital authorities must care for their patients:

> . . . by the staff which they employ, and, if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him . . . . It is no answer for them to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work . . . . The reason why the employers are liable in such cases is not because they can control the way in which the work is done --they often have not sufficient knowledge to do so --but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct--the power of dismissal.[11]

The control test, thus, appears to have changed from the employer having control over how the work is to be done, to the employer having control over the employment--the hiring and firing--of the employees. This newer form of control is an essential element of the employment relationship requirement for vicarious liability. If the potential defendant does not hire (and have the option to dismiss) the tortfeasor, then no employment relationship may exist.

When the Employer is Liable

The employer is liable for his employee's torts as long as they are committed within the scope of the employee's employment. The master is liable not only for what he authorized his servant to do, but also for the manner in which he does it.[12] The master is liable for torts committed within the scope of the servant's employment, and this has been extended by the courts:

> . . . since the master put the servant in a position in which he could do a class of acts, he must be answerable for anything the servant does in the process of performing one of that class of acts, however the servant choses to do it.[13]

Since the employer put the employee in the position to perform certain acts, the employer is liable for non-authorized acts provided they are connected with authorized acts and may be regarded as modes of performing the authorized acts.[14] It has been held that a master is liable

for the acts of his servant even if the acts are negligent, fraudulent or contrary to express orders.[15]

A master is liable therefore, when the servant does appointed work in a way the master has not authorized and would not have authorized if he had known of it. On the other hand, a master is not liable when a servant is using his master's time or equipment for his own purposes, or when a servant does something outside the scope of his employment.[16]

2. Justification for the Existence of Vicarious Liability

Many justifications for the evolvement of vicarious liability have been postulated. Some of the more common ones are:

(1) Vicarious liability ". . . owes its explanation, if not its justification, to the search for a solvent defendant."[17] The employer is most always wealthier than the employee, and thus in a better position to compensate the victim.[18] The employer can allow for this loss much in the same manner as he would provide for fire, or other, insurance. The loss can more easily be borne among many, so the employer usually raises the price of his product and hence the risk is borne by that section of the public that uses his product.[19] When the employer is a school board the loss distribution can be passed onto the public by increased school taxes.

(2) In cases where one of many employees caused the harm, vicarious liability creates a "group responsibility" in the name of the master.[20] This eliminates the evidentiary burden on the plaintiff, and the plaintiff need sue only the employer, since he is responsible for the acts of all his employees.[21]

(3) The master choses his servants and thus should be liable if he choses wrongly or carelessly.[22]

(4) Since the master has set the course of conduct in motion, by employing the servant to do particular acts, but for the wishes of the master the wrong would not have happened. Thus the master should be liable.[23]

(5) The master should be liable for the servant's torts since the master has "control" over the servant. The master controls the method of performing the job--he can tell the servant how to do the job--and thus should be held liable if it is done wrongly.[24] This control over an employee as to how to do the work is no longer effective.

(6) Vicarious liability can act as a form of accident prevention. Knowing that they are liable, employers may ensure that their employees take care while performing their duties.[25]

(7) It is felt that since the master obtains the benefits from the servants' work, the master should bear the burden

of the liability for the servants' torts which are committed while doing that work.[26]

The first explanation for the existence of vicarious liability is most in keeping with the historic basis of the tort law's development--the desire to compensate the victim. Since tort law was developed to compensate the victim for harm caused, it seems likely that the law would strive to find the defendant most capable of paying, liable for the damage. Whether or not the courts intended this, the result is that this is the case today. The employer, who normally has the assets to compensate an injured party, is liable for the wrongs committed by his employees, in the course of their employment.

3. Vicarious Liability in Schools

Vicarious liability in schools has been established by both statute and case law. Not all of the provinces have sections in their school acts to create vicarious liability. Some of those that do are:

The Secondary Education Act, R.S.S. 1965, c. 183.

> 70. Where the board, the principal or the teacher approves or sponsors activities during the school hours or at other times the teacher responsible for the conduct of the pupils shall not be liable for damage caused by pupils to property or for personal injury suffered by pupils during such activities.

The Public Schools Act, R.S.M. 1970, c. P250.

> 277. (1) Where injury or death is caused to a pupil enrolled in or attending a public school,
>
> (a) during, or as a result of, a course of instruction carried on within the school; or
>
> (b) during, or as a result of, physical training, physical culture, gymnastic exercise, or drill, carried on in connection with the school activities; or
>
> (c) before or after school hours, or during recess, upon the school grounds or in the school house of the district;
>
> no cause of action accrues to the pupil or to any other person for loss or damage suffered by reason of the bodily injury or death, against the school district or any servant or agent thereof or any trustee of the district unless it is shown that the injury or death was caused by the negligence of the school district or misconduct of any of its servants or agents or of any one or more of the trustees. (emphasis added)

Other acts provide for insurance coverage for accidental injury to pupils. This can be interpreted to show that the school board has been provided with the financial resources, that is, insurance, to become the "solvent defendant." Examples of such sections are:

The School Act, R.S.S. 1965, c. 184.

> 118. It shall be the duty of the board of every district and it shall have power:
>
> 22. if deemed advisable, to effect insurance indemnifying the school district against liability in respect of any claim for damages or personal injury;

The School Administration Act, R.S.O. 1970, c. 422.

> 34. A board may
>
> 19. make provisions for insuring the board, its employees or any group thereof, against claims in respect of accidents

> incurred by pupils while under the jurisdiction or supervision of the board;

Only some of Canada's provinces have created statutes which concede that vicarious liability exists in the schools. Those provinces that are without such statutes are governed by the common law, which includes many Canadian precedents on this issue.

In Walton v. Vancouver Board of School Trustees,[27] in which the school board authorized a shooting competition in which the plaintiff was hurt, Macdonald, C.J.A. said:

> . . . it is enough to say that if [the board] do authorize or permit such a practice, the duty to supervise it properly must be held to rest upon them and a breach of that duty will subject them to damages.[28]

In the case of Gard,[29] Robertson, J.A. changed the wording of the test set out in Williams v. Eady,[30] to ". . . the duty of a School Board to take such care as a reasonably careful parent . . . ."[31] (emphasis added). When a nine year old boy was injured in a wrestling match conducted by the teacher, in the case of Hall et al. v. Thompson et al.,[32] Treleaven, J. said in the trial:

> There can be no doubt that if the defendant Thompson is liable, the co-defendant, the Board of School Trustees, is also liable. The relation of master and servant existed between the Board and the teacher and the activity in question was part of the physical training of the pupils and therefore within the scope of employment of the teacher. . . .[33]

This same concept was also stated in Beauparlant et al. v.

Board of Trustees of Separate School Section No. 1 of Appleby et al.,[34] as:

> There is no doubt that a School Board is liable in law for an accident due to a teacher's negligence if in a matter which may reasonably be regarded as falling within the scope of his employment . . . .[35]

In Moddejonge,[36] the court found the teacher subject to legal liability. The court then went on to note:

> It is to be observed that McCauley was acting within the scope of his employment. It follows that the defendant Board is also liable.[37]

That there is in common law vicarious liability in regards to teachers and school boards was set out clearly in Schade,[38]

> It is now established by a great weight of authority that at common law the relation between the board and its teachers is that of master and servant, and that the board is liable at common law for the negligence of its teachers acting within the course of their employment.[39]

School boards, therefore, are liable for the negligent acts of their employees, as long as these acts are within the course of employment of the teacher. This is set out by statute in some provinces, and by common law in all provinces.

FOOTNOTES

1 McCurdy, Shelburne G., The Legal Status of the Canadian Teacher, The MacMillan Co. of Canada Ltd., Toronto: 1968.

2 The Secondary Education Act, R.S.S. 1965, c. 183, s. 69 (2).

3 Fleming, John G., The Law of Torts, fourth edition, The Law Book Company, Sidney: 1971, at 312.

4 Atiyah, P.S., Vicarious Liability in the Law of Torts, Butterworths, London: 1967.

5 supra.

6 The School Act, R.S.A. 1970, c. 329, s. 74.

7 Ryan v. Fildes and Others [1938] 3 All E.R. 517.

8 Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Limited and Another [1947] A.C. 1 (P.C.), at 17.

9 Kahn-Freund, O. "Servants and Independent Contractors," (1951) 14 Mod. L. Rev. 504.

10 supra.

11 Cassidy v. Ministry of Health [1951] 1 All E.R. 574.

12 C.P.R. v. Lockhart [1942] A.C. 591 (P.C.).

13 Fridman, G.H.L., The Law of Agency, third edition, Butterworths, London: 1971, at 230.

14 C.P.R., supra, n. 12.

15 Hilton v. Thomas Burton (Rhodes) Ltd. [1961] 1 All E.R. 74.

16 C.P.R., supra, n. 12.

17 Williams, Glanville, "Vicarious Liability and the Master's Indemnity," (1957) 20 Mod. L. Rev. 220, at 232.

18 Atiyah, supra, n. 4.

19 Williams, supra, n. 17.

20 supra.

21 Atiyah, supra, n. 4.

22 supra.

23 Williams, supra, n. 17.

24 Mersey Docks, supra, n. 8.

25 Atiyah, supra, n. 4.

26 supra.

27 [1924] 2 W.W.R. 49 (B.C.C.A.).

28 supra, at 51.

29 Gard v. Board of School Trustees of Duncan [1946] 2 D.L.R. 441 (B.C.C.A.).

30 (1893) 10 T.L.R. 41.

31 Gard, supra, n. 29, at 456.

32 [1952] 4 D.L.R. 139 (Ont. C.A.).

33 supra, at 140.

34 [1955] 4 D.L.R. 558 (Ont. H.Ct.).

35 supra, at 560.

36 Moddejonge et al. v. Huron County Board of Education et al. [1972] 2 O.R. 437 (Ont. H.Ct.).

37 supra, at 444.

38 Schade v. Winnipeg School District No. 1 and Ducharme (1958) 27 W.W.R. 546 (Man. Q.B.).

39 supra, at 568.

CHAPTER VIII

DEFENCES TO TORTIOUS LIABILITY

A defence is that which is put forward to diminish the plaintiff's claim. A defence can be partial or full. A partial defence is one which ". . . goes only to a part of the cause of action, or which only tends to mitigate the damages to be awarded."[1] For example, contributory negligence is a partial defence, and if it is found that the plaintiff was contributorily negligent, damages are awarded in a percentage equal only to the defendant's fault. Thus, if a plaintiff was 30 per cent to blame for his own injuries, he would be awarded only 70 per cent (the amount of blame of the defendant) in damages. A full defence, on the other hand is one that completely frees the defendant of all blame, such as voluntary assumption of risk.

The defences generally available to school boards are:

1. contributory negligence,
2. statutory time limitations exceeded by plaintiff,
3. custom,
4. no duty of care, and

5. others.

1. Contributory Negligence

Contributory negligence is a partial defence to an action in negligence. It is one that can be used successfully by teachers and school boards, since children can be found to be liable for contributory negligence.* The test set out in McEllistrum,[2] by which the court looks at the age, intelligence and experience of the child, is used.

Contributory negligence has been discussed in Canadian cases in regards to actions of children while engaged in physical activities on school property. In Butterworth v. Collegiate Institute Board of Ottawa,[3] a fourteen year old boy was injured while vaulting a box horse, in an unsupervised class. The action was dismissed since no negligence was found on the part of the school board or teacher, but, the court make comments on the knowledge of the boy in regards to his own ability.

> . . . the infant plaintiff was conscious of the fact that previously he had been clumsy, and also conscious of the fact that on previous occasions boys had been helping, yet on the occasion of the accident knowing he had been clumsy, knowing the horse, and knowing that there were no boys posted, he attemps the exercise.[4]

An action for injuries sustained by a twelve year old

---

* see p. 67.

boy when he jumped from the roof of a woodshed was dismissed in Koch and Koch v. Stone Farm School District.[5] The court found that:

> The boy knew that he was doing what he had expressly been forbidden to do, he was quite old enough to appreciate the danger, and deliberately took the risk. After all it was no more dangerous than the risks boys of that age constantly take in their play . . . . his injury was occasioned by his own wilful misconduct.[6]

Another case which was dismissed because there was no negligence on the part of the school board, but which discussed the negligence of the child, was Schade v. Winnipeg School District No. 1 and Ducharme.[7] In this case a fourteen year old boy was injured when he tripped over a construction marker stake on the school playground, while playing a game of scrub baseball. The court found that the plaintiff was ". . . an intelligent and shrewd lad, he had received full instruction in the game, had qualified for the school team . . ."[8] but that he used no care for his own safety. Williams, C.J.Q.B. went on to say:

> I hold that the negligence of Ronald Schade in not looking where he was running was the sole cause of his injury.
>
> If either defendant was guilty of negligence Ronald was clearly guilty of contributory negligence . . . . I should have held that Ronald's negligence should be assessed at 90 per cent.[9]

Two twelve year old boys who were hit in the eye by branches, while playing tag on an uncleared part of the

school grounds, lost their case on an appeal by the school board. The appeal court in Portelance et al. v. Board of Trustees of Roman Catholic Separate School for School Section No. 5 in Township of Grantham,[10] found that the boys were familiar with the premises, knew the danger of running through the bushes, and had been warned by the teacher not to play in that area.

In each of these cases the action by the plaintiff was dismissed because there was no duty on the part of the school board to protect the child from the type of danger encountered, or there was no negligence on the part of the teacher or school board. If there had been a duty and if negligence was proven, then the contributory negligence of the child would affect only the apportionment of damages.

2. Statutory Time Limitations Exceeded by Plaintiff

As in most areas of the law, there are statutory time limits which set the time period within which an action in tort must be commenced. Usually a statute such as The Limitation of Actions Act[11] lists the time limitations for most forms of civil actions. Generally, an action in tort must be commenced within two years from the date of the injury.[12] There are special exceptions to these general time periods, however, and the ones which affect actions against teachers and school boards are often found in acts

concerning schools or public authorities. That these exceptions supersede the general time periods established by limitation of actions statutes was upheld in Longphee et al. v. Board of School Trustees of School District # 14 in Parish of Shediac.[13] In this case a student was injured while playing on some lumber in the school yard at recess. An action for damages was not commenced within the three month period set out by the Schools Act.[14] The trial judge and the New Brunswick Supreme Court both held that the section of the Schools Act was a good defence to the action, and thus held that the shorter time limitation was to be followed.

The acts which limit the time period in which to commence an action against a teacher or school board generally reduce the time period to six months or less. Some of these acts read as follows:

The School Act, R.S.S. 1965, c. 184.

> 278. No action shall be brought against a school district for the recovery of damages after the expiration of six months from the date upon which damages were sustained, . . .

The School Act, R.S.N.B. 1952, c. 204.

> 71. (1) No action shall be brought against any school trustee individually or against the trustees in their corporate capacity, . . . for anything done by virtue of the office of trustees . . . , unless within three months after the act committed, and upon one month's previous notice thereof in writing.

The Public Authorities Protection Act, R.S.O. 1970, c. 374.

> 11. No action, prosecution or other proceedings lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

Many of these sections have been upheld in cases brought against teachers and school boards. In Levine v. Board of Education of the City of Toronto,[15] a boy was injured in an athletic meet held by the school. He did not request medical assistance from the doctor in attendance, and did not bring an action against the school board until five years later. The court held that if the games were authorized by the school board, they were entitled to the protection of the Public Authorities Protection Act, and since the action was brought after the time limitation period in the act, the action was dismissed. Another case, Ritchie v. Gall and Vancouver Board of School Trustees,[16] in which a fourteen year old boy was injured by a car in a driveway outside of the school door, on school property, was dismissed in part. The majority of the court held that a letter which only outlined the facts of the accident was not sufficient to show the school board an intention to start an

action against them. Therefore, the action against the board was not allowed because the action was not actually commenced until after the statutory time limit for such actions.

A decision of the Supreme Court of Canada in McGonegal and Trustees of Leeds and Lansdowne Front Township School Area v. Gray et al.[17] dismissed the appeal by the defendant teacher and board. The plaintiff, a twelve year old boy, was burnt when he attempted to light a gas stove to heat some soup for the teacher's lunch. The school board approved the serving of soup to the students, but on this occasion only the teacher wanted to have some. The action by the plaintiff was commenced after the six month statutory time limit, but Locke, J. in the majority decision, said:

> In my opinion, the proper construction to be placed upon this evidence is that [the teacher] intended to heat some soup for her own use and not for the purpose of providing hot food for the children . . . . In heating food for her own use the teacher was not performing or attempting to perform an act of the nature referred to in s. 11 of the Public Authorities Protection Act and, in my opinion, the section [with regards to the time limit] has no application.[18]

In order to use the protection of a statutory time limit, the teacher must be acting within the scope of his employment.

Generally, there are statutory time limits enacted by each province which set the maximum time period, usually two years, within which a party may initiate an action for

personal damage. There are exceptions to these statutes in acts concerning schools and public authorities, which create a shorter time period within which an action against a teacher or school board must be commenced. It is interesting to note that Alberta has no such exception. Only teachers who are acting within the scope of their employment are protected by these shorter time limitations.

3. Custom

A custom is a general practice that has been carried on for some time and has been approved by the community in which it exists. Conformity with custom usually will dispel a charge of negligence.

Two Physical Education cases support this. In Walton v. Vancouver Board of School Trustees,[19] a boy was hurt during a shooting competition at the school. The court held that a shooting competition held by the teacher was not outside the teacher's scope of employment, since the competition had been held for many years and had been authorized by the board. In Bovin and Bovin v. Glenavon School District[20] a nine year old girl fell from a horizontal ladder, when she tried to swing too quickly along it, and broke her arm. There were no mats on the floor and no supervision. In twelve years of similar use there had been only two minor

accidents reported. An expert witness at trial said:

> . . . in country schools, like the one in question which are without the financial resources of [universities], it was not customary for the authorities to provide mats under gymnastic equipment.[21]

The court held that the child ". . . would have broken her arm anyway,"[22] allowed the defence of custom, and dismissed the action.

If it is shown that a custom is not dangerous in itself, it may be an adequate defence.

4. No Duty of Care

In some actions against school boards for injury to pupils the courts have held that the school boards owed no duty of care to the children under the circumstances of the case. There are two instances of circumstances which produce this result. The school board owes no duty of care to children who are not on the school property, and it owes no duty of care to children outside of the school hours.

It has been established that once children are off school property the school board no longer owes them a duty of care in regards to their safety. This does not apply to school approved trips. In Patterson v. Board of School Trustees of North Vancouver[23] an eight year old boy was injured when a tree, from property adjacent to the school property, fell on him while he was standing off school

property on the highway. In the appeal by the school board Macdonald, C.J.A. said:

> I have been unable to find any case and we have been referred to none, which would impose upon the school board the duty of protecting the plaintiff from injury on the highway after he had left the school premises.[24]

A similar decision was laid down in Pearson v. Vancouver Board of School Trustees et al.[25] In this case the plaintiff, a seven year old boy, ran from the gates of the school grounds into the path of a bicycle ridden by an eleven year old girl, and was hit 8-10 feet from the boundary of the school property. The court found that there was no negligence on the part of the girl and that the plaintiff did not keep a proper lookout for himself. Regarding the liability of the school board, Sidney Smith, J. said:

> . . . even if the defendant [girl] had been negligent there would not im my opinion have been any liability on the part of the school board. There is not around school grounds a zone over which the school authorities exercise supervision . . . . School supervision does not extend beyond the school premises.[26]

The second instance when no duty of care exists between school boards and pupils, is during the time before and after school hours. Scoffield et al. v. Public School Board of Section No. 20, North York,[27] is a case where a girl was injured when she fell from a toboggan on the school property at 8:45 a.m. when the teachers were in their classrooms as

required by statute. The case was dismissed since the teachers were not required to supervise at that time, and supervision would not have prevented the accident. In another case, Dyer (otherwise Venables) et al. v. Board of School Commissioners of Halifax,[28] an eleven year old boy, while on the school grounds which were supervised by teachers, was hit in the eye by an acorn which was thrown by a playmate just prior to the completion of the lunch hour. The court took care to ascertain the time of the accident to determine if it occurred during the time in which the teachers were required to be on supervisory duty. It was determined that the accident did occur within the period of supervision, but the action failed since the supervision provided was deemed adequate. The fact that the accident could have happened prior to the period of supervision was of concern to the court:

> I find that the regulations did provide for a reasonably adequate system of supervision in general . . . . The failure to provide teacher supervision before 1:50 p.m. in the face of knowledge that students did begin arriving ten minutes or so before that time has given one some pause; but it does not in itself constitute a breach of the legal standard . . . . there is evidence that the principal had advised pupils not to come before the period of supervision. . . .[29]

Had this accident occurred before the period of supervision the outcome may have been arrived at for a different reason.

This duty of supervision of students during the hours before and after school was discussed in Edmondson v. Board of Trustees for the Moose Jaw School District No. 1.[30] In this case an eight year old boy lost an eye when he was hit by the broken end of a bamboo cross bar, while he watched high jumping practice, after the students were dismissed at 4 o'clock. Elwood, J.A., in a majority decision, said in regards to this issue:

> I am of the opinion that there is nothing in the School Act, or in the regulations of the department, which renders the Board of Trustees of a school district insurers of the safety of the children in going to and returning from the school. They have a certain amount of control over the children, by which, I apprehend, the children are liable to expulsion, punishment or correction if they fail to behave themselves in going to or from school; but if, for instance, one boy should attack another in going to or from school and cause injury to the other, I apprehend that there would be no liability on the School Board therefore. Or if some of the boys were engaging, we will say, in a game of football or baseball, and some boy was injured in the game after school hours and while standing as a spectator to the game, there would not, I apprehend, be liability on the part of the School Board. So far as this case is concerned, the infant respondant had no right to be where he was at the time of the accident. It was out of school hours; his duty was to go home.[31]

The appeal was decided in favour of the school board, since the boy should not have stayed on school property after being dismissed, the equipment was safe for the activity it was being used for, and the child put himself into a position of danger, after being warned.

A non-physical education case supported the view that there is not a duty to supervise before the classes begin in the morning. Koch[32] held that the school board was not liable for the injuries sustained by a twelve year old pupil janitor, when he jumped from the roof of a woodshed after the teacher rang the bell to open school. The boy had been instructed by the teacher, as well as by his parents, not to climb onto school buildings. In regards to the issue of supervision times, Taylor, J. said:

> It is enough to add that neither expressly nor by implication does The School Act impose on the trustees or the teacher, if she could be held to be their servant, any obligation to so supervise the pupils at their play, which could possibly suggest a duty to supervise the conduct of these three oldest scholars in the school yard before they reported themselves to the teacher on arrival in the morning.[33]

In an action for injury suffered off the school premises or outside of school hours, it appears that the school board owes no duty of care to the pupils. Clearly, no duty arises once a child has crossed the boundary line of the school property. The duty is not as certain, and depends on the facts of each case, when students are injured on school property but outside of school hours, especially when teacher supervision is present.

5. Other Defences

It has been held that a school board is not liable for

the unauthorized acts of its servants. In Beauparlante et al. v. Board of Trustees of Separate School Section No. 1 of Appleby et al.,[34] two teachers gave their students a half holiday to attend a concert. No request was made to the school board and no permission was given to do this. The teachers arranged for a truck to transport the children, and during the trip a side from the box of the truck broke and fell off. Some of the approximately sixty children fell out and were injured. The court dismissed the action against the school board and held:

> There is no doubt that a School Board is liable in law for an accident due to a teacher's negligence if in a matter which may reasonably be regarded as falling within the scope of his duty . . . .[35]

Since no permission was given by the board:

> . . . the teachers, in organizing this trip and in allowing the children their freedom from their regular studies, were exceeding their authority and were not acting within the scope of their authority, express or implied.[36]

Thus a school board may use the defence that the injury occurred in an unauthorized activity, and thus the board is not liable for the negligence of the teacher, although the teacher may have to pay damages for the injury he caused.

Some provinces have enacted statutory defences such as time limitations. Another form of statutory defence is a section of the Public School Act[37] of Manitoba which reads:

> 79. Neither the division nor its trustees, servants or agents, nor any of them shall be deemed to be guilty of negligence solely by reason of the fact that a pupil who is required to wear eye-glasses is permitted to take part in physical training, physical culture, gymnastic exercises or drills or to participate in any play or game carried on in connection with school activities.

A teacher or school board will be relieved of liability if any of these defences is accepted by the court.

FOOTNOTES

1 Black, Henry Campbell, Black's Law Dictionary, fourth edition, West Publishing Co., St. Paul, Minn.: 1968, at 508.

2 McEllistrum v. Etches [1956] S.C.R. 787.

3 [1940] 3 D.L.R. 466 (Ont. S.C.).

4 supra, at 472.

5 [1940] 1 W.W.R. 441 (Sask. K.B.).

6 supra, at 442.

7 (1958) 27 W.W.R. 546, affirmed (1959) 28 W.W.R. 577 (Man. C.A.).

8 supra, at 564.

9 supra, at 566.

10 (1962) 32 D.L.R. (2d) 337 (Ont. C.A.).

11 The Limitation of Actions Act, R.S.A. 1970, c. 209.

12 supra, s. 51.

13 (1960) 24 D.L.R. (2d) 723 (N.B.S.C.).

14 Schools Act, R.S.N.B. 1952, c. 204, s. 71 (1).

15 [1933] O.W.N. 152, affirmed [1933] O.W.N. 238 (Ont. C.A.).

16 [1934] 3 W.W.R. 703 (B.C.C.A.).

17 [1952] 2 D.L.R. 161 (S.C.C.).

18 supra, at 177.

19 [1924] 2 W.W.R. 49 (B.C.C.A.).

20 [1937] 2 W.W.R. 170 (Sask. C.A.).

21 supra, at 175.

22 supra, at 176.

23 [1929] 2 W.W.R. 181 (B.C.C.A.).

24 supra, at 182.

25 [1941] 3 W.W.R. 874 (B.C.S.C.).

26 supra, at 876.

27 [1942] O.W.N. 458 (Ont. C.A.).

28 [1956] 2 D.L.R. (2d) 349 (N.S.S.C.).

29 supra, at 400-01.

30 (1920) 55 D.L.R. 563 (Sask. C.A.).

31 supra, at 573.

32 [1940] 1 W.W.R. 441 (Sask. K.B.).

33 supra, at 443.

34 [1955] 4 D.L.R. 558 (Ont. H.Ct.).

35 supra, at 560.

36 supra, at 561.

37 R.S.M. 1970, c. P250.

CHAPTER IX

CONCLUSIONS

It is important for Physical Education teachers, and indeed, for all teachers, to understand their legal liablity in relation to the students whom they teach. By understanding their liability, and the legal duties this liability encompasses, teachers can be better prepared to avoid situations which may give rise to a liability action.

Teachers have certain duties in regards to their relationship with their students. These duties are set both by statute and case law, and generally, are similar throughout Canada. Provincial statutes provide that all teachers be qualified to teach; this qualification is evidenced by the issuing of a "teaching certificate" to the teacher, by the Department of Education. Other statutory duties, as set out in school acts, include such duties as: to teach in a prescribed manner; to keep records of attendance and evaluation of students; to maintain order and discipline in the school; to take good care of school equipment and to report any need of repair to school equipment to the board;

and to give attention to the health of the students.

Case law has enforced duties on teachers in relation to students in the classroom and at times outside of the classroom. When children are in a regular Physical Education class, the teacher has a duty: to give instruction by progressive steps and in areas suited to the children's mental and physical development; to supervise the students in a reasonable manner; and to provide adequate safety measures for the protection of the children.

When children are on the school grounds during times when teachers are on supervisory duty, and during approved activities outside of class time, teachers have the duty: to anticipate dangers; to warn the students of these dangers; and to supervise the students in a reasonable manner. During travelling to approved activities, a teacher has no duty of care to students when they are being transported by an independant contractor; but, the teacher has the duty of care required by any driver of a motor vehicle, when transporting pupils himself. Generally, there is no duty owed to children who are on school property outside of school hours, or to those who are off school property.

Teachers are protected from personal responsibility for damages by the doctrine of vicarious liability. By this doctrine, the school board is liable for any negligent acts

of its employees which occur within the scope of their employment.

It appears, therefore, that a teacher who knows what his legal duties towards his students are, will be able to take care that a breach of these duties does not occur.

Because of the limited nature of this study, in that it was an examination of the tortious liability of Physical Education teachers, certain important aspects of the total problem were not examined. It is therefore recommended that further study in three areas would be advisable to complete a total understanding of this problem. These areas are:

(1) An examination of the qualification of Physical Education teachers to determine if (a) their university training prepares them to meet the duties demanded of them, and (b) to determine if qualified persons are actively employed by the school boards as Physical Education instructors.

(2) An examination of the provincial regulations and school board regulations to determine if standards are set which conform to the common law duties required.

(3) An evaluation of the liability test used in the courts to determine the liability of Physical Education teachers, to determine if a new test should be adopted by the courts.

BIBLIOGRAPHY

Articles

Alexander, E.R., "Tort Responsibility of Parents and Teachers for Damage Caused by Children," (1965-66) XVI U.T.L.J. 165.

DeGraves, W.R., "Damages Caused by Children--Responsibility of Parents--Responsibility of Child," Isaac Pitblado Lectures on Continuing Legal Education, 1970, The Law and the Minor, 44.

Glos, George E., "Torts--Doctrine of Professional Negligence --Standard of Professional Care," (1963) 41 Can Bar Rev. 140.

Haid, Inez, "Teachers May Just Be Employees," The O.E.C.T.A. Review, October, 1972, 44.

Harris, Edwin C. "Occupiers' Liability in Canada," in Linden, Allen M. Studies in Canadian Tort Law, Butterworths, Toronto: 1968, 250.

Jewers, G.O., "Damages Suffered by Children--The Standard of Care Owed to Children," Isaac Pitblado Lectures on Continuing Legal Education, 1970, The Law and the Minor, 49.

Kahn-Freund, O., "Servants and Independent Contractors," (1951) 14 Mod. L. Rev. 504.

Kenny, Harold M., "Are Principals Skating on the Thin Ice of Legal Lake?" Comment on Education, Vol. 14, No. 1, October, 1973, 15.

Nemirsky, Judith C., "A Question of Liability," The Alberta School Trustee, March, 1972, 17.

O'Sullivan, J.F., "Infants and Contributory Negligence," Isaac Pitblado Lectures on Continuing Legal Education, 1970, The Law and the Minor, 38.

Shulman, Harry, "The Standard of Care Required of Children," (1927-28) 37 Yale L.J. 618.

Williams, Glanville, "Vicarious Liability and the Master's Indemnity," (1957) 20 Mod. L. Rev. 220.

Wilkins, L. David, "The Future of Occupiers Liability to Trespassers in Canada," (1965-66) 4 Alta. L. Rev. 447.

Wright, C.A., "The Province and Function of the Law of Torts," in Linden, Allen M., Studies in Canadian Tort Law, Butterworths, Toronto: 1968, 1.

Books

Atiyah, P.S., Vicarious Liability in the Law of Torts, Butterworths, London: 1967.

Bargen, Peter Frank, The Legal Status of the Canadian Public School Pupil, The Macmillan Company of Canada Limited, Toronto: 1961.

Barrell, G.R., Teachers and the Law, Methuen & Co. Ltd., London: 1966.

Barrell, G.R., Legal Cases for Teachers, Methuen & Co., Ltd., London: 1970.

Black, Henry Campbell, Black's Law Dictionary, fourth edition, West Publishing Co., St. Paul, Minn.: 1968.

Christie, Innis, editor, Legal Writing and Research Manual, Butterworths, Toronto: 1970.

David, Rene and Brierley, John E.C., Major Legal Systems in the World Today An Introduction to the Comparative Study of Law, Stevens & Sons, London: 1968.

Enns, Frederick, The Legal Status of the Canadian School Board, The Macmillan Company of Canada Limited, Toronto: 1963.

Fleming, John G., An Introduction to the Law of Torts, The Clarendon Press, Oxford: 1969.

Fleming, John G., The Law of Torts, The Law Book Company Limited, Australia: 1971.

Frank, W.F., The General Principles of English Law, second edition, George G. Harrap & Co. Ltd., London: 1961.

Fridman, G.H.L., The Law of Agency, Butterworths, London: 1971.

Heuston, R.F.V., Salmond on the Law of Torts, sixteenth edition, Sweet & Maxwell, London: 1973.

Jolowicz, J.A., Lewis, T. Ellis and Harris, D.M., Winfield and Jolowicz on Tort, ninth edition, Sweet & Maxwell, London: 1971.

Kiralfy, A.K.R., The English Legal System, third edition, Sweet & Maxwell, London: 1960.

Lamb, Robert L. Legal Liability of School Boards and Teachers For School Accidents, Research Study No. 3, Research Division, Canadian Teachers' Federation, 1959.

Linden, Allen, M., editor, Studies in Canadian Tort Law, Butterworths, Toronto: 1968.

Linden, Allen M., Canadian Negligence Law, Butterworths, Toronto: 1972.

McCurdy, Sherburne G., The Legal Status of the Canadian Teacher, The Macmillan Company of Canada Limited, Toronto: 1968.

Saunders, John B., Mozeley and Whiteley's Law Dictionary, Butterworths, London: 1970.

Williams, Glanville, Learning the Law, seventh edition, Stevens & Sons, London: 1963.

Wright, Cecil A., Cases on the Law of Torts, fourth edition, Butterworths, Toronto: 1967.

Wright, Cecil A., and Linden, Allen M., The Law of Torts Cases, Notes and Materials, fifth edition, Butterworths, Toronto: 1972.

APPENDIX A

Glossary of Terms

Action: The legal and formal demand of one's right from another person or party make and insisted on in a court of justice.

Crown: The sovereign power in a monarchy, especially in relation to the punishment of crimes.

Damages: A compensation in money for loss.

Defendant: The person defending or denying; the party against whom relief or recovery is sought in an action.

Infant: A person not of full age, a minor, a person not 18 years of age (in Alberta).

Orders-in-Council: An order made by a governing body under statutory authority.

Parties: The persons who take part in the performance of any act, or who are actively concerned in the prosecution and defence of any legal action.

Plaintiff: A person who brings an action; the party who complains or sues in a personal action.

Regulation: The act of regulating; a rule or order prescribed for management or government.

Stare decisis: To abide by, or adhere to, decided cases.

Suit: The term which applies to any proceeding by one person or persons against another, in a court of justice.

Tort: A private or civil wrong or injury.

Tortious: Wrongful, of the nature of a tort.

Tribunal: The seat of a judge; the whole body of judges who compose a jurisdiction; a judicial court.

APPENDIX B

Judicial Statements on Specific Physical Activities and Physical Education Apparatus

(1) Baseball:

Schade v. Winnipeg School District No. 1 and Ducharme (1958) 27 W.W.R. 546 (Man. Q.B.)

Williams, C.J.Q.B., at 564:

I respectfully agree with Robertson, J.A. who said in Gard v. Duncan S.D., supra (WWR p. 327):

"It seems to me that a 'careful father' would not hesitate to allow his boy of 11 years of age to engage in a game of grass hockey without supervision."

And I would add the words "or baseball" after the word hockey.

(2) Grass hockey:

Gard v. Board of School Trustees of Duncan [1946] 2 D.L.R. 441 (B.C.C.A.)

Robertson, J.A., at 457:

No doubt accidents from breaches of rules do occur in grass hockey games. The same is true of lacrosse, football, cricket, baseball or any other game played under rules. A stanza attributed to Adam Lindsay Gordon (see 14 Can. Bar Review, p. 822) reads:

"No game was ever yet worth a rap
For a rational man to play,
Into which no accident, no mishap,
Could possibly find a way."

A distribution lies between things which are obviously dangerous . . . and those which are not, but in which there may be potential danger under certain circumstances.

and at 459:

While, as I have said, danger may eventuate in any game, and in that sense injury to one of the players might

LEAF 168 OMITTED IN PAGE NUMBERING

be foreseen, yet that danger is one of the risks of the game, which every parent knows goes with the game; and I think the chances of any risk eventuating in a game of grass hockey played by children would be very slight.

(3) Gymnastics

Butterworth et al. v. Collegiate Institute Board of Ottawa [1940] 3 D.L.R. 466

Mackay, J., at 472:

. . . it may very well be that it was the duty of the defendant to recognize that the use of gymnastic apparatus, such as a vaulting horse, involves the risk of injury, . . .

(4) High jump

Edmondson v. Board of Trustees for the Moose Jaw School District No. 1 (1920) 55 D.L.R. 563 (Sask. C.A.)

Haultain, C.J.S., at 563:

There was nothing unusual or out of the common in the apparatus in question, and it was being used in the ordinary way. That the pole should be knocked down is an ordinary incident of any jumping competition, and under ordinary circumstances there is no resulting danger.

Newlands, J.A., at 565:

This pole could not be considered a trap, as it was not dangerous to anyone using it. It was no more dangerous to spectators than any other instruments used in sports . . .

(5) Swings

Brost and Brost v. Tilley School District et al. (1955) 15 W.W.R. 241 (Alta. S.C.)

C.J. Ford, J.A., at 253:

. . . a swing is [not] inherently dangerous or an improper kind of equipment for school grounds, but it is potentially

dangerous, . . . and the higher one swings, the greater the danger becomes, . . . and this danger is a foreseeable one. Because of this, instructions, at least to young pupils, on how to get on and off, and how to swing, should be given.

(6) Wrestling

Hall et al. v. Thompson et al. [1952] 4 D.L.R. 139 (Ont. C.A.)

Treleaven, J., at 141:

No evidence of any kind was submitted to support the claim that wrestling is inherently dangerous . . . . It may, of course, be true that in all games or contests of skill involving the testing and development of physical strength accidents will happen, but it does not follow, in my opinion, that they should therefore be classed as inherently dangerous.